92-784

No. 92-

Supreme Court, U.S.
FILED
OCT 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR., *Petitioners,*

v.

NANCY FELDMAN and KIM LITTLE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the expression attendant to the initiative petition process, from certification through voting, core political speech?

2. Does Oklahoma law, as construed and applied, violate the First and Fourteenth Amendments as a prior restraint on core political speech when the Oklahoma Supreme Court strikes from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision?

PARTIES TO THE PROCEEDINGS

Petitioners (Proponents below) are the Oklahoma Coalition to Restrict Abortion, Inc., and Fred W. Sellers, Jr.

Respondents (legal sufficiency Protestants below) are Nancy Feldman and Kim Little.

Petitioners have filed a Rule 12.4 notification with the Clerk of this Court concerning Janet Taliaferro, Andrew Tevington, and Pam Fleischaker (numerical sufficiency Protestants below), who have no interest in the outcome of the legal sufficiency protest.

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OPINION BELOW

The Oklahoma Supreme Court's slip opinion (63 OKLA. B.J. 2386 (August 4, 1992) (No. 76,437) (App. 1a-52a)) was designated for publication, but has not been published in the Pacific Reporter, Second Series.

JURISDICTIONAL STATEMENT

The Oklahoma Supreme Court's final judgment was entered on August 4, 1992. This petition is being filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. OKLA. CONST. art. II, § 1

Political power – Purpose of government – Alteration or reformation

All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it; Provided, such change be not repugnant to the Constitution of the United States.

4. OKLA. CONST. art. V, § 1

Legislature – Authority and composition – Powers reserved to people

The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

5. OKLA. CONST. art. V, § 2

Designation and definition of reserved powers – Determination of percentages

The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

6. OKLA. STAT. tit. 34, § 8 (1991)

Filing copy of proposed petition – Publication – Protest – Hearing and determination

When a citizen or citizens desire to circulate a petition initiating a proposition of any nature, whether to become a statute law or an amendment to the Constitution, or for the purpose of invoking a referendum upon legislative enactments, such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and exact copy of same in the office of the Secretary of State and, within ninety (90) days after such filing of an initiative petition, the signed copies thereof shall be filed with the Secretary of State, but the signed copies of a referendum petition shall be filed with the Secretary of State within ninety (90) days after the adjournment of the Legislature enacting the measure on which the referendum is invoked. The electors shall sign their

legally-registered name, their address, and the name of the county in which they reside. Any petition not filed in accordance with this provision shall not be considered. When the signed copies of a petition are timely filed, the Supreme Court of the state shall make or cause to be made a physical count of the number of signatures appearing on the petitions. Upon order of the Supreme Court it shall be the duty of the Secretary of State to forthwith cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency thereof and notice that any citizen or citizens of the state may file a protest to the petition or an objection to the count made by the Supreme Court of the state, by a written notice to the Supreme Court of the state and to the person or persons filing the petition, said protest to be filed within ten (10) days after publication. In case of the filing of an objection to the count, notice shall also be given to the party filing a protest, if one was filed. The Supreme Court of the state shall then fix a day, not less than ten (10) days thereafter, at which time it will hear testimony and arguments for and against the sufficiency of such petition. A protest filed by anyone hereunder may, if abandoned by the party filing same, be revived within five (5) days by any other citizen. After such hearing the Supreme Court of the state shall decide whether such petition be in form as required by the statute. If the Court be at the time adjourned, the Chief Justice shall immediately convene the same for such hearing. No objection to the sufficiency shall be considered unless the same shall have been made and filed as herein provided.

Provided, that whenever reference is made in this act to the Supreme Court of the state, such reference shall include the members of the Supreme Court of the state or any officer constitutionally designated to perform the duties herein prescribed.

RECITATION OF RULE 29.4(c) COMPLIANCE

Section 2403(b) of title 28 of the United States Code is applicable because the constitutionality of an Oklahoma stat-

ute, OKLA. STAT. tit. 34, § 8, as well as OKLA. CONST. art. II, § 1, affecting the public interest has been drawn into question and the State of Oklahoma is not a party to the legal sufficiency protest of Respondents; consequently, three copies of this petition have been served upon the Oklahoma Attorney General by depositing this petition in a United States mailbox, with first-class postage prepaid thereon, and addressed to:

Susan B. Loving, Esq.
Attorney General of Oklahoma
Neal Leader, Esq.
Assistant Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105.

STATEMENT OF THE CASE

This core political speech case arises from an original proceeding in the Oklahoma Supreme Court concerning an initiative petition, State Question 642. The Oklahoma Supreme Court had prepared an order approving State Question 642 for a vote of the people, but, at that critical point, this Court issued its decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Capitalizing on *Casey*, the Oklahoma Supreme Court reviewed, sua sponte, State Question 642's content. The court struck State Question 642 from the ballot and foreclosed further political debate on the initiative petition solely because of its content. Petitioners request that a writ of certiorari to the Oklahoma Supreme Court issue, that the Oklahoma Supreme Court's final order be vacated, and that this case be remanded for completion of the initiative petition process.

On June 29, 1990, Petitioners filed their initiative petition pamphlet, including the text of the proposed law, State Question 642. App. 109a-120a. During the ninety-day period from June 29, 1990, through September 27, 1990, the petition pamphlets were circulated, and 106,537 signatures were obtained and filed. App. 75a.

On December 17, 1990, the Oklahoma Supreme Court entered an order (App. 106a-108a), the publication of which started the time period for filing protests to State Question

642. On December 31, 1990, Respondents filed a protest to the legal sufficiency of the petition. App. 95a-105a.[1] Respondents claimed in paragraph 10 of their protest (App. 99a-100a) that State Question 642 was unconstitutional. Then, on March 23, 1992, Respondents filed a brief, which stated:

> [Respondents] hereby withdraw their federal and state constitutional claims.

App. 86a, 47a. On April 13, 1992, the Oklahoma Supreme Court issued an order (App. 83a) dismissing the ballot title challenge of Respondents.

Nevertheless, on July 14, 1992, the Oklahoma Supreme Court, in a five to four decision, issued a briefing order (App. 88a-94a) requiring the parties to file simultaneous briefs on the constitutionality of State Question 642 in light of *Casey*. Vice Chief Justice Hodges dissented from the court's sua sponte briefing order because neither Petitioners nor Respondents had requested a constitutional review of the proposed statute after the pronouncement of *Casey*. App. 94a. Vice Chief Justice Hodges also revealed that, prior to *Casey*, an opinion approving the initiative for a vote of the people had been prepared and was being readied for publication. App. 94a. On July 15, 1992, Petitioners filed a suggestion to the court (App. 86a-87a) emphasizing that, on March 23, 1992, Respondents had withdrawn their federal and state constitutional claims, and that the time for filing protests, including constitutional protests, had expired on January 7, 1991.

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[1] On January 4, 1991, Janet Taliaferro, Andrew Tevington, and Pam Fleischaker filed a numerical sufficiency protest claiming that Petitioners submitted fewer valid signatures than the number required to bring State Question 642 to a vote of the people. The August 4, 1992, judgment of the Oklahoma Supreme Court concerns only the legal sufficiency protest of Respondents — not the numerical sufficiency protest of Taliaferro, Tevington, and Fleischaker.

Briefs were filed by Petitioners and Respondents, as well as the numerical sufficiency protestants, the Attorney General,[2] and amici curiae. In their July 24, 1992, brief, Petitioners relied on *Meyer v. Grant*, 486 U.S. 414 (1988), for the proposition that the expression attendant to the initiative petition process, from circulation through voting, is core political speech. App. 59a-61a. In addition, Petitioners directed the Oklahoma Supreme Court's attention to this Court's express rejection in *Meyer* of the states' rights argument that, because the initiative is a state-created right, the state may impose limitations on that right. App. 60a.

On August 4, 1992, a final judgment was entered by the Oklahoma Supreme Court ordering State Question 642 "stricken from the ballot." *In re Initiative Petition 349, State Question 642*, 63 OKLA. B.J. 2386, 2393 (August 4, 1992) (No. 76,437) (App. 17a). The first part of the opinion determined the constitutionality of the proposed law, State Question 642, under the United States Constitution. Four justices dissented from part two of the majority opinion, which recognized, but rejected, the core political speech argument raised in Petitioners' July 24 brief. The majority of the court stated:

> Assuming arguendo, the relevance of proponents' "core speech" argument in this context, it is obvious that these rights are not absolute. Judicial intervention to interdict a hypothetical state constitutional amendment prohibiting the free exercise of religion would "limit" the proponents "core speech" activities; however, no one would question the legitimacy of such a limitation.

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[2] On July 16, 1992, Petitioners filed a motion to disqualify the Attorney General (App. 79a-85a) because the Attorney General's role in an Oklahoma initiative petition proceeding is fixed by Oklahoma statute. The Attorney General's role, which was completed on January 7, 1991, is limited to determining whether the proposed ballot title is in legal form and in harmony with the law. App. 84a-85a.

63 OKLA. B.J. at 2391 (App. 12a). The court found State Question 642 to be unconstitutional, but suggested:

> [T]he proponents may present a *proper* petition for submission to a vote of the people.

Id. at 2389 (emphasis added) (App. 8a).

In the judgment, the Oklahoma court concluded that a presubmission determination of the constitutionality of an initiative petition is justified when a "costly" and "useless" election may be avoided. *Id.* at 2392 (App. 16a). The court stated that a vote on State Question 642 would serve as "an expensive, non-binding public opinion poll," and if submitted to the people for a vote, a "costly, fruitless, and useless election would take place." *Id.* at 2392 (App. 16a). The court concluded that if the people want to vote on a "valid" enactment, they have the right to circulate another petition. *Id.* at 2393 (App. 16a).

Concerning the states' rights theory, the Oklahoma Supreme Court departed from *Meyer's* reasoning and stated:

> It seems self-evident that the exercise of a non-federal right can be conditioned by the same state constitution that creates and confers it.

63 OKLA. B.J. at 2391 (App. 12a).

Thus, the Oklahoma Supreme Court struck State Question 642 from the ballot because of its content.

REASONS FOR ALLOWING THE WRIT

SUMMARY OF THE REASONS

The advocacy attendant to the initiative petition process is core political speech. Although a state is not required to provide its citizens with the right of the initiative, that right, once created, may not be restricted on the basis of the initiative's content.

In the instant case, the Oklahoma Supreme Court ignored these principles and struck from the ballot State Question 642 on the basis of its content.[3] In rendering its decision, the court considered and rejected Petitioners' core political speech argument, which included a discussion of First Amendment protection of advocacy related to initiative petitions.

While the concept of political advocacy is at the very heart of this nation's principles of free expression, seven states, including Oklahoma, presently permit the censoring of an initiative petition on the basis of its content. Seventeen other jurisdictions that have initiative petition systems do not censor the content of state questions. A decision from this Court clarifying the protections to be afforded the advocacy attendant to initiative petitions would protect the right of expression in all initiative petition jurisdictions.

I
THE UNANSWERED QUESTIONS

A. *Is the expression attendant to the initiative petition process, from certification through voting, core political speech?*

CIRCULATION TO CERTIFICATION

The initiative petition process is a vehicle for core political speech during the circulation phase. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). In *Meyer*, this Court held that preventing the payment of circulators constituted an impermissible limi-

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[3] Title 34, section 8, of the Oklahoma Statutes and article II, section 1, of the Oklahoma Constitution have been applied by the Oklahoma Supreme Court to control the content of the expression attendant to State Question 642. While Petitioners are asserting an overbreadth challenge in this petition, the principal thrust of Petitioners' argument is that the First Amendment is violated by the Oklahoma Supreme Court's overbroad construction of Oklahoma law, which is invalid as applied:

> [A] statute ... may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.

Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

tation on political expression during the circulation phase, which violated the First and Fourteenth Amendments.

CERTIFICATION TO VOTING

Although the holding in *Meyer* focused on core political speech during the circulation phase of the initiative petition process, the *Meyer* rationale covers the entire initiative petition process. This Court made clear in the last paragraph of *Meyer* that advocacy for the passage or defeat of citizen-initiated legislation is core political speech. 486 U.S. at 428. Thus, advocacy during the certification-to-voting phase is core political speech.

The Oklahoma Supreme Court refused to characterize expression attendant to the certification-to-voting phase as core political speech. Yet, the period from certification to voting is when core political speech is at its zenith.

The Oklahoma Supreme Court assumed that the First Amendment protects core political speech only during the circulation period. *In re Initiative Petition 349*, 63 OKLA. B.J. at 2391 (App. 13a). The court's opinion stands for the proposition that the dialogue between a circulator and an initiative petition signer enjoys greater First Amendment protection than the advocacy for the passage or defeat of the state question. The Oklahoma Supreme Court failed to recognize that core political speech continues after the circulation of the petition. The debate and advocacy regarding the passage or defeat of citizen-initiated legislation constitutes the campaign. If the election is not certified, the campaign never occurs. Advocacy during the certification-to-voting period should receive as much protection under the First Amendment as core political speech during the circulation-to-certification period.

VOTING

Voting "yes" or "no" on a state question is a communication of approval or disapproval of the change proposed by the measure. The purpose of casting a vote on a state question is to communicate the political thinking of the voter.

The act of voting on an issue of public concern is conduct sufficiently expressive to merit First Amendment protection.

The test established by this Court for identifying expressive conduct is whether an intent to convey a certain communication is present, and whether the likelihood is great that the communication will be understood. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). By casting a vote on a state question, a citizen communicates an unmistakable message indicating approval or disapproval of the measure.

B. *Does Oklahoma law, as construed and applied, violate the First and Fourteenth Amendments as a prior restraint on core political speech when the Oklahoma Supreme Court strikes from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision?*

POLITICALLY CORRECT

There is no First Amendment precept of "politically correct" speech. The Oklahoma Supreme Court utilized a U.S. Supreme Court decision to define "proper" initiative petitions. 63 OKLA. B.J. at 2389 (App. 8a). Thus, the Oklahoma Supreme Court made this Court the final arbiter of what is or is not "politically correct." According to the Oklahoma Supreme Court, political debate on a subject must conform to the U.S. Supreme Court's viewpoint on that subject. There is no "politically correct" test for core political speech.[4] In its practical operation, Oklahoma law, as invalidly applied by the Oklahoma Supreme Court, goes beyond content discrimination to viewpoint discrimination. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547 (1992).

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[4] Oklahoma Supreme Court Chief Justice Opala suggested a "rule of reason":

> Only in the clearest case of *firmly settled* and *stable* federal constitutional jurisprudence that *absolutely* condemns the proposed measure as facially impossible of enforcement, application or execution — and then *only* if the protestants have standing to complain of constitutional infirmity — would this court ever be justified in not clearing an initiative petition for submission to a vote of the people. ***This case falls far short of that category.***

63 OKLA. B.J. at 2395 (Opala, C.J., dissenting) (emphases in original) (App. 22a). However, even this standard would violate the First and Fourteenth Amendments as an impermissible content control.

II
OKLAHOMA'S CONSTITUTIONAL DEPARTURE

CONSTRUCTION

Title 34, section 8, of the Oklahoma Statutes, as construed by the Oklahoma Supreme Court,[5] is invalid as applied because it controls the content of core political speech. The statute was narrowly drawn by the legislature and regulates only the form of the initiative petition. The Oklahoma court has misused this narrowly drawn statute to review initiative petitions for constitutional orthodoxy.

The authority for the Oklahoma Supreme Court's review procedure has been its construction and application of one sentence within the initiative petition statutes:

> After such hearing the Supreme Court of the state shall decide whether such petition be in ***form*** *as required by the statutes.*

OKLA. STAT. tit. 34, § 8 (emphasis added). The phrase "form as required by the statutes" has been construed by the Oklahoma Supreme Court to include "constitutional." According to the court, "form" includes "substance." This construction of OKLA. STAT. tit. 34, § 8, was first rendered by the Oklahoma Supreme Court in *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma,* 534 P.2d 3, 8 (Okla. 1975):

> Under present initiative procedure, 34 O.S. Supp. 1973 § 8, administrative duties formerly placed on administrative officials have been legislated directly to this court. We believe this court is not limited solely to the duties of an administrative officer or act. It may consider the constitutionality of matters to be considered under the initiative and referendum process as to procedure

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[5] This Court is bound by the Oklahoma Supreme Court's construction of OKLA. STAT. tit. 34, § 8, and OKLA. CONST. art. II, § 1. *See R.A.V.,* 112 S. Ct. at 2542.

> *form* and subject matter, when raised, and if in this court [sic] opinion such a determination could prevent a costly and unnecessary election.

Id. (emphasis added). This passage was cited by the court with approval in its August 4, 1992, judgment (63 OKLA. B.J. at 2390 (App. 10a)) despite Petitioners' showing in their July 24, 1992, brief (App. 63a-64a) that nowhere within OKLA. STAT. tit. 34, § 8, is there a delegation of authority to the Oklahoma Supreme Court to judge the content of a state question prior to the vote of the people.

Petitioners' challenge in this petition includes the Oklahoma Supreme Court's broad construction and invalid application not only of OKLA. STAT. tit. 34, § 8, but also of OKLA. CONST. art. II, § 1, which provides:

> All political power is inherent in the people; and *government* is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or *reform the same* whenever the public good may require it; Provided, *such change* be not repugnant to the Constitution of the United States.

Id. (emphases added). That section, which is part of Oklahoma's Bill of Rights, provides that government is instituted for the protection of the people and they can alter the same, provided such change is not repugnant to the United States Constitution. The words "the same" refer to the "government" and not to the content of statutes proposed by initiative petitions. Instead, the court construed and applied this section so that the people may not debate and vote on a state question if the content of the initiative petition is contrary to a U.S. Supreme Court decision. The initiative petition process is established in article V, sections 1-8. Nothing in the Oklahoma Bill of Rights limits the article V initiative petition process.

LICENSING

The Oklahoma Supreme Court's invalid application of state law functions as a licensing of political speech. Licensing is a prior restraint on speech. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992). This Court has stated:

> Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.

Id. at 2404. In this case, the Oklahoma Supreme Court used its purported licensing power to strike State Question 642 from the ballot due to its content.

QUANTUM

This Court held in *Meyer* that, when the quantity of the debate is reduced, an impermissible restriction on First Amendment speech occurs. In so holding, this Court stated:

> The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue.

Meyer, 486 U.S. at 423. This Court continued:

> Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open . . . .
>
> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. . . . That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. [Citations omitted.] The First Amendment protects appellees' right not only to advocate their cause *but also to select what they believe to be the most effective means for so doing.*

Id. at 424 (emphasis added).

During the spring and early summer of 1992, in anticipation of an opinion approving State Question 642 for a vote of

the people,[6] the quantum of expression concerning the subject of State Question 642 exponentially increased. The August 4, 1992, decision of the Oklahoma Supreme Court had the immediate effect of decimating the quantum of speech on the subject of State Question 642.

EXACTING SCRUTINY

In *Meyer*, this Court held that the burden that must be overcome by a state attempting to regulate political expression is "exacting scrutiny," which is "well-nigh insurmountable." *Meyer*, 486 U.S. at 420, 425. The Oklahoma Supreme Court's justification for the regulation of core political speech attendant to the initiative petition process is that the vote on State Question 642 would be "costly" and "useless." *In re Initiative Petition 349*, 63 OKLA. B.J. at 2392 (App. 16a). These are not First Amendment concepts, and they will not survive exacting scrutiny.

COSTLY

The people have an interest in assuring that initiatives are not placed before them unless they desire to bear the expense of an election on a state question. This interest is met by the content-neutral, eight percent requirement set forth in article V, section 2, of the Oklahoma Constitution. Furthermore, the vote can occur at any regular election. OKLA. STAT. tit. 34, § 25. The only additional cost to be incurred if State Question 642 is set for a general election will be the printing of the 141-word ballot title on the ballot.[7]

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[6] *See* July 14, 1992, briefing order (Hodges, V.C.J., dissenting) (App. 94a).

[7] Oklahoma Supreme Court Justice Wilson stated:

> Relying on popular information, but without a single allegation nor any evidence, this Court determines that resolution of the constitutionality of the proposed measure will prevent a "costly" election.... The cost of government simply does not warrant judicial interference with the legislative process.

In re Initiative Petition 349, 63 OKLA. B.J. at 2403 n.14 (Wilson, J., dissenting) (App. 45a).

USELESS

The Oklahoma Supreme Court characterized as "useless" a vote of the people. "Useless" is not a First Amendment concept. First Amendment speech need not be utilitarian; it has intrinsic value. Core political speech is valuable in a democracy whether or not it produces a tangible result. Regardless of whether State Question 642 results in a change of Oklahoma law, democracy will benefit from the exchange of ideas attendant to the debate and vote on the subject.

Oklahoma law has been invalidly applied by the Oklahoma Supreme Court to the point of vagueness. "Useless" is a purely subjective term.

THE *CASEY* ANALOGY

The Oklahoma Supreme Court based its decision in this case, in part, on the premise that this initiative petition was an improper attempt to change constitutional law. *In re Initiative Petition 349*, 63 OKLA. B.J. at 2392 (App. 14a). The example of *Casey* illustrates the folly of censoring the subject of legislation[*] based on a U.S. Supreme Court decision. The potential impact of State Question 642 on constitutional law would have been no different from the impact on the constitutional law at issue in *Casey* — a decision that reversed earlier constitutional law.

The Pennsylvania legislature drafted a statute, which, at the time of its proposal and debate within the Pennsylvania legislature, was unconstitutional. *See generally City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) *(Akron I); Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). The Pennsylvania legislators undoubtedly knew that the proposed statute was contrary to *Akron I* and *Thornburgh*. Nevertheless, the statute was passed, and a case was filed testing its constitutionality. It went through the federal court

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[*] The legislature in Oklahoma is of two varieties: a legislature of senators and representatives, and a fully empowered legislature consisting of the people. OKLA. CONST. art. V, § 1.

system, finally arriving at this Court, which overruled *Akron I* and *Thornburgh*.[9] Thus, a change in constitutional law was achieved. *Casey* would never have come about had the Pennsylvania Supreme Court performed the preenactment constitutional review that the Oklahoma Supreme Court performed.

STATES' RIGHTS

The Oklahoma Supreme Court apparently believes that the initiative petition process is exempt from First Amendment considerations because:

> It seems self-evident that the exercise of a non-federal right can be conditioned by the same state constitution that creates and confers it.

In re Initiative Petition 349, 63 OKLA. B.J. at 2391 (App. 12a).

In *Meyer*, this Court specifically rejected a "states' rights" argument that, because the initiative is a state-created right, the state may impose limitations on that right. This Court stated:

> Finally, the [Tenth Circuit] Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative procedure, it could impose this condition on its use. Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because, unlike [*Posadas* (citation omitted)], which involved only commercial speech, this case involves "core political speech."

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[9] To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled.

Casey, 112 S. Ct. at 2823.

> . . . As we explained in [*Thornhill* (citation omitted)], "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

Meyer, 486 U.S. at 420. This Court continued:

> Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced. . . . Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions.

Id. at 424-25. Once a state has provided its people with the initiative petition forum for First Amendment expression, the state may not limit debate within that forum on the basis of the content of the expression.

III
THE CONFLICTING VIEWS

The Oklahoma Supreme Court's content-based review of state questions is not an isolated practice. Of the twenty-four jurisdictions that have initiative petition procedures, seven jurisdictions[10] permit the screening of initiatives on the basis of their content.

Twelve jurisdictions[11] refuse to review the content of citizen-initiated legislation prior to enactment, and five jurisdictions[12] have never ruled on preenactment review. While those seventeen jurisdictions do not currently conduct content-based censorship of initiative petitions, neither did

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[10] California, Florida, Montana, Nevada, North Dakota, Oklahoma, and Utah.

[11] Alaska, Arizona, Colorado, Idaho, Illinois, Massachusetts, Michigan, Missouri, Ohio, Oregon, South Dakota, and Washington.

[12] Arkansas, District of Columbia, Maine, Nebraska, and Wyoming.

Oklahoma until 1975.[13] For sixty-five years,[14] Oklahoma was in the category of jurisdictions refusing to review the content of citizen-initiated legislation prior to enactment. In 1975, however, the Oklahoma Supreme Court began to review state questions on the basis of their content.[15]

Thus, a decision by this Court resolving the questions presented herein will not only remedy the violation of Petitioners' important First Amendment rights, but also provide far-reaching protection to all who would participate in the advocacy attendant to initiatives in twenty-four jurisdictions.

IV
PUBLIC POLICY CONSIDERATIONS

In *R.A.V.* this Court stated:

> The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

112 S. Ct. at 2548. The majority of the Oklahoma Supreme Court silenced the debate on State Question 642. The First Amendment forbids the government from silencing one side in the struggle of ideas, but, in this case, the Oklahoma Supreme Court took sides and closed the free marketplace of ideas.

The Oklahoma Supreme Court's constitutional screening process prevents debate on new concepts and new laws. In a democracy, not only is this intolerable, it is dangerous. The people are entitled to participate in their political system. The ultimate vehicle for participation by the people in their political system is the initiative petition process. The First and Fourteenth Amendments of the United States Constitution protect this vehicle for core political speech:

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[13] *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okla. 1975).

[14] *Threadgill v. Cross*, 109 P. 558 (Okla. 1910).

[15] *Norman*, 534 P.2d at 8.

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." [Citation omitted.] . . . [T]heir right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.

Meyer, 486 U.S. at 421.

In *Meyer*, the Tenth Circuit Court of Appeals rendered a judgment in favor of the initiative petition proponents. Consequently, it was not essential for this Court to hear *Meyer* for the core political speech to occur. In this case, however, the core political speech will not occur unless this Court grants this petition and protects the expression attendant to the initiative petition process.

CONCLUSION

Oklahoma law, as invalidly applied by the Oklahoma Supreme Court, operates as a content-based prior restraint upon the expression attendant to the initiative petition process, from certification through voting. The Oklahoma Supreme Court's invalid application of Oklahoma law clearly violates the free speech rights guaranteed by the First and Fourteenth Amendments, with the result of preventing speech that is at the core of the electoral process.

Based on the arguments presented, this case should be decided by summary disposition. In the alternative to summary disposition, the question of presubmission content determination, upon which the states are divided, makes this case worthy of plenary review.

Petitioners request that this petition be granted, and that the judgment of the Oklahoma Supreme Court be vacated pursuant to 28 U.S.C. § 2106. Further, Petitioners request that, upon summary disposition, this Court remand this case to the Oklahoma Supreme Court for further consideration in light of *Meyer*, 486 U.S. 414, or, in the alternative, Petitioners request that, upon plenary review, this Court remand

this case to the Oklahoma Supreme Court for completion of the initiative petition process.

Respectfully submitted,

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**IN RE: INITIATIVE PETITION NO. 349.
STATE QUESTION NO. 642.**

No. 76,437. August 4, 1992

ORIGINAL PROCEEDING TO DETERMINE THE VALIDITY OF INITIATIVE PETITION NO. 349, STATE QUESTION NO. 642; AND APPEAL OF THE BALLOT TITLE.

Although this proceeding, filed in reference to Initiative Petition No. 349 (petition/abortion petition), initially presented multiple issues, the United States Supreme Court's decision in *Planned Parenthood v. Casey,* 60 U .S .L.W. 4795, 4805 (U.S. June 29, 1992), ___ U.S. ___, ___S.Ct. ___, ___ L.Ed.2d ___ (1992) has rendered a single issue dispositive—whether Initiative Petition No. 349 is constitutional. We find: 1) that the issue of the constitutionality of the initiative petition is governed by the United States Supreme Court's pronouncement in *Casey;* and that we are bound to follow the mandate of the United States Supreme Court on matters of federal constitutional law; and 2) that when the unconstitutionality of the initiative petition is manifest, a pre-election judicial determination of the issue is both appropriate and necessary to avoid a costly and useless election.

The *Casey* court held that: 1) a woman's right to obtain an abortion is a liberty interest protected by the Due Process Clause of the fourteenth Amendment; 2) viability marks the earliest point at which the State's interest is constitutionally adequate to justify a legislative ban on nontherapeutic abortions; and 3) before viability, a woman may choose to have an abortion without undue interference by the State. Because Oklahoma women who do not fall within four narrowly defined categories would be absolutely prohibited from exercising the pre-viability liberty interest expressly recognized by *Casey,* we are required to find the initiative petition unconstitutional. We also find that an examination of the constitutionality of the initiative petition is necessary, both to avoid misleading citizens about the legal effect of the proposi-

tion upon which they may vote, and to avoid a costly election which would ultimately be an exercise in futility. (Nevertheless, this ruling does not prohibit the circulation of a proper initiative petition or of legislation which passes constitutional muster.)

INITIATIVE PETITION INVALID; ORDERED STRICKEN FROM THE BALLOT.

Kevin M. Abel, William A. Caldwell, Michael W. Pierce, Tulsa, for proponents, Oklahoma Coalition to Restrict Abortion, Inc. and Fred W. Sellers, Jr.

Robert H. Henry, Atty. Gen., Susan Loving,[1] Atty. Gen., Neal Leader, Asst. Atty. Gen., Rachel Lawrence-Mor, Asst. Atty. Gen., Oklahoma City, Thomas Dee Frasier, Laura Emily Frossard, Gary Dean Allison, Tulsa, for protestants, Nancy Feldman & Kim Little.

Richard A. Mildren, Gary L. Watts, Oklahoma City, Rebecca J. Patten, Norman, Kathryn Kolbert, Simon Heller, Andrew Dwyer, New York, NY, for protestants Janet Taliaferro, Andrew Tevington, & Pam Fleischaker.

Roger K. Evans, Carole Chervin, New York, NY, for amici curiae, U.S. Senator David Boren, U.S. Representative Dave McCurdy, U.S. Representative Mike Synar, The Former Speaker of the United States House of Representatives Carl Albert, Bruce Ackerman, Paul Brest, Guido Calabresi, Walter Dellinger, Geoffrey Stone, & Lawrence Tribe.

KAUGER, J., Although this proceeding, filed in reference to Initiative Petition No. 349 (petition/abortion petition), initially presented multiple issues, the United States Supreme Court's decision in *Planned Parenthood v. Casey,* 60 U.S.L.W. 4795, 4805 (U.S. June 29, 1992), ___ U.S. ___, ___S.Ct. ___, ___L.Ed.2d ___ (1992) has rendered a single issue dispositive--whether Initiative Petition No. 349 is constitutional. We find: 1) that the issue of the constitutionality of the initiative petition is governed by the United States Supreme Court's pronouncement in *Casey;* and that we are bound to follow the mandate of the United States Supreme Court on

matters of federal constitutional law; and 2) that when the unconstitutionality of the initiative petition is manifest, a pre-election judicial determination of the issue is both appropriate and necessary to avoid a costly and useless election.

The *Casey* court held that: 1) a woman's right to obtain an abortion is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment;[2] 2) viability marks the earliest point at which the State's interest is constitutionally adequate to justify a legislative ban on nontherapeutic abortions; and 3) before viability, a woman may choose to have an abortion without undue interference by the State. Because Oklahoma women who do not fall within four narrowly defined categories would be absolutely prohibited from exercising the pre-viability liberty interest expressly recognized by *Casey*, we are required to find the initiative petition unconstitutional. We also find that an examination of the constitutionality of the initiative petition is necessary, both to avoid misleading citizens about the legal effect of the proposition upon which they may vote, and to avoid a costly election which would ultimately be an exercise in futility. [Nevertheless, this ruling does not prohibit the circulation of a proper initiative petition or of legislation which passes constitutional muster.]

RELEVANT PROCEDURAL HISTORY

The proponents, Oklahoma Coalition to Restrict Abortion, Inc., and Fred W. Sellers, Jr. (collectively, proponents/Sellers) filed petition pamphlets with the Secretary of State on June 29, 1990. On December 31, 1990, the protestants, Nancy Feldman and Kim Little (collectively, Feldman) filed a protest to the legal sufficiency of the petition. On January 8, 1991, the Secretary of State filed the proposed ballot title prepared by the Attorney General. The proponents filed a timely appeal to the ballot title on January 17, 1991. Although Feldman also appealed the ballot title, the challenge was dismissed by order of this Court on April 13, 1992, as being untimely. However, a valid ballot title challenge is before us — the one filed by the proponents. The initial briefing period concerning the legal sufficiency of Initiative Petition No. 349

was commenced when this Court ordered a briefing schedule on March 3, 1992. The final filings of the parties were submitted to the Court on June 4, 1992.

The issue of the constitutionality of the initiative petition was fairly raised within certain of the other issues raised by Feldman in the challenge to the legal sufficiency of the petition.[3] On July 4, 1992, in the interest of fairness, we ordered the parties and the Attorney General to submit simultaneous briefs addressing Casey and its impact on the constitutionality of the proposed ballot title and the substance of Initiative Petition No. 349.[4] Those briefs were filed on July 24, 1992.

In response to this Court's order of July 14, 1992, the proponents, Sellers, and the protestants, Nancy Feldman, Kim Little, Janet M. Taliaferro, Andrew Tevington, and Pam Fleischaker (collectively, protestants) and the Attorney General filed briefs specifically addressing the constitutionality of the initiative petition in relation to the United States Supreme Court's decision in *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795, 4805 (U.S. June 29, 1992), ___ U.S. ___, ___ S.Ct. ___, ___L.Ed.2d ___ (1992). We also granted the amici's motion to brief the issue. The protestants, the amici curiae, and the Attorney General assert that Initiative Petition No. 349 is unconstitutional under the United States Supreme Court's ruling in *Casey*. As we read the proponents submission, they concede that the initiative petition was unconstitutional when it was drafted, that it was unconstitutional when it was circulated, and that it is unconstitutional now. However, the proponents insist that we should allow the petition to go forward as an exercise in political advocacy. We find that the initiative petition is unconstitutional based on controlling federal precedent enunciated by the United States Supreme Court as recently as June 29, 1992.

I.

THE CONSTITUTIONALITY OF THE INITIATIVE PETITION IS GOVERNED BY THE UNITED STATES SUPREME COURT'S PRONOUNCEMENT IN *PLANNED PARENTHOOD v. CASEY*. BECAUSE

WOMEN WHO DO NOT FALL WITHIN FOUR NARROWLY DEFINED CATEGORIES MAY NOT EXERCISE THE PRE-VIABILITY LIBERTY INTEREST RECOGNIZED BY *CASEY*, WE ARE REQUIRED TO FIND THE INITIATIVE PETITION UNCONSTITUTIONAL.

When the initiative petition was filed, it appeared that a major reexamination of the law in relation to a woman's right to obtain a nontherapeutic abortion was in progress. Legal commentators anticipated either the overruling or the substantial undercutting of the principles of *Roe v. Wade*, 410 U.S. 113,163-64, 93 S.Ct. 705, 731-32, 35 L.Ed.2d 147, 182-83 (1973).[5] In *Webster v. Reproductive Health Serv.*, 492 U.S. 490,518 109 S.Ct. 3040, 3052, 106 L.Ed.2d 410, 435-36 (1989), the United States Supreme Court rejected the strict trimester approach of *Roe v. Wade*. The *Webster* Court also found that a State's interest in protecting human life did not come into play only at viability as previously expressed in *Roe*.[6] Additional evidence of the uncertainty surrounding *Roe's* continuance as a rule of law can be seen by the vote in *Webster*. Five Justices—Chief Justice Rehnquist, Justices White and Scalia, who have consistently voted to overrule *Roe*, as well as Justices O'Conner and Kennedy—joined in part IID of the majority opinion criticizing *Roe*.[7]

After June 29, 1992, when the United States Supreme Court promulgated its opinion in *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795,4805 (U.S. June 29, 1992), ___ U.S. ___, ___ S.Ct. ___, ___L.Ed.2d ___ (1992), co-authored by Justices O'Conner, Kennedy, and Souter,[8] which reiterates, and perhaps strengthens, the central premise of *Roe*—that women, may for some time period, make independent decisions to obtain nontherapeutic abortions—the submission could not go forward. *Casey* reaffirmed the central premise of *Roe v. Wade*, 410 U.S. 113,153-54, 93 S.Ct. 705, 727, 35 L.Ed.2d 147, 177 (1973), *reh'g denied*, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973), that the right of privacy founded in the Fourteenth Amendment's concept of personal liberty includes a woman's right to have an abortion. Five

members of the *Casey* Court's precedential inquiry joined in part IIIA of the opinion which found that "*Roe's* underpinnings were unweakened in any way affecting its central principle" and that *Roe was not "unworkable."*[9]

The issue of the constitutionality of the initiative petition is governed by the United States Supreme Court's pronouncement in *Casey.* In this instance, the only course available to this Court is to follow what the United States Supreme Court, the final arbiter of the United States Constitution, has decreed.

In *Planned Parenthood v. Casey,* 60 U.S.L.W. 4795, 4800 (U.S. June 29, 1992), ___ U.S. ___, ___S.Ct. ___, ___L.Ed.2d ___ (1992), the United States Supreme Court framed the constitutional question as:

> "...whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest...."

After considering the constitutional questions, the principles of institutional integrity, and the rule of stare decisis, the majority answered the question by concluding that the essential holding of *Roe* should be both retained and reaffirmed. The *Casey* Court, after balancing the woman's liberty interest against the State's interest in fetal life, held that the line should be drawn at viability; that before that time the woman has a right to choose to terminate her pregnancy; and that, before viability, no state may deprive a pregnant woman of that right.[10] Five members of the Court agreed that:

> "...It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the proce-

dure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.... Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that a State shall not 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the case before us is 'liberty.'..."[11]

Initiative Petition No. 349 *criminalizes* and *absolutely prohibits* abortions except in four narrow circumstances: 1) grave impairment of the female's physical or mental health; 2) rape as defined in 21 O.S. 1991 §1111; 3) incest as defined in 21 O.S. 1991 §885; and 4) grave physical or mental defect of the fetus.[12] If the abortion does not fall within one of the exceptions, any person who performs or aids or abets in the performance of an abortion upon another person is punishable by up to four years imprisonment.[13] Initiative Petition No. 349 does not allow a woman to make a private decision to obtain an abortion at any time during the pregnancy—either before or after viability. It does not protect a woman's liberty interest as defined by *Casey*.

Because the United States Supreme Court has spoken, this Court is not free to impose its own view of the law as it pertains to the competing interests involved. The Supremancy Clause of the United States Const. art. VI, cl. 2 provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary*

notwithstanding." (Emphasis supplied.)

Likewise, the Oklahoma Constitution requires compliance with federal constitutional law on issues of federal law.[14] Art. 1, §1 of the Okla. Const. provides that:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

We are doubly bound to uphold the law of the land. Our limited role, like the role of all state courts in such cases, is to apply federal constitutional law, not to make it nor to guess what it may become.[15] By virtue of our constitutional oath of office,[16] we have solemnly sworn to uphold the Constitution of the United States. *Roe and Casey* may be overruled. The Freedom of Choice Act of 1992, now pending before Congress, which would codify *Roe*, may be enacted. Or, the proponents may present a proper petition for submission to a vote of the people. Speculation as to which of many paths the law in a given area will take in the future is a transparent veil behind which people act out their own policy preferences. "Guesses" about the future development of any rule of law have never been an acceptable rule of decision in Anglo American jurisprudence.

We will uphold the law of the land whatever it may be. Today, the law of the land is that a woman has a constitutionally protected right to make an independent choice to continue or to terminate a pregnancy before viability. Because viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions, and because women who do not fall within four narrowly defined categories may not exercise the pre-viability liberty interest recognized by *Casey*, we are compelled to find the initiative petition unconstitutional. Not quite two years ago, we defined our duty in In re *Initiative Petition No. 344*, *797* P.2d 326, 330 (Okla. 1990) holding that:

> "...This Court is the Protector of our Constitution. While the electorate has a constitutional right to amend the

Oklahoma Constitution, it is this Court's responsibility to see the petitions for change actually reflect the voters intent and comply with the requirements set out in both the Constitution and the statutes. In this case, the requirements are simply not met."

The unconstitutional abortion ban is the cornerstone of Initiative Petition No. 349.[17] Without the inclusion of the petition's restrictions, the remainder of the proposed legislation is meaningless. Therefore, the existence of a severability provision is of no avail in the instant cause.[18] Neither can the Court rewrite the provision to ensure that it meets the constitutional requirements of *Casey*.[19] We are required to preserve a woman's right to make a decision to obtain an abortion before viability to maintain harmony with the law. This position is diametrically opposed to the proposal presented.

II.

A PRE-SUBMISSION DETERMINATION OF THE CONSTITUTIONALITY OF THE INITIATIVE PETITION IS APPROPRIATE AND NECESSARY WHERE THE PROPOSAL IS FACIALLY UNCONSTITUTIONAL AND IS JUSTIFIED WHEN A COSTLY AND FUTILE ELECTION MAY BE AVOIDED.

Although the proponents continue to press for an election on the initiative petition, they apparently admit that the petition was unconstitutional under *Roe* when it was drafted and circulated, and that, if it were adopted by a vote of the people, it would be unconstitutional under *Roe* and *Casey*. The proponents claim that notwithstanding the facial unconstitutionality of Initiative Petition No. 349, the people should be permitted to vote because In re *Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okla. 1975) was wrongly decided, and additionally that the people have an absolute right to vote on any measure. The proponents urge us to allow a vote on the petition in order to present a "test case" urging the United States Supreme Court to overrule or to redetermine *Roe* and *Casey*.

The protestants, the Attorney General, and the amici charge not only that the measure is unconstitutional under *Casey*, but that to allow the question to appear on the November ballot would be to sanction a costly, divisive, and unnecessary election. The Attorney General, who may under certain circumstances have the duty of defending the measure if it were adopted by a vote of the people and subsequently challenged, asserts that such a measure cannot be defended because no principled argument can be made in its defense.

In re *Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okla. 1975), was decided seventeen years ago. Since then, this Court, in an unbroken chain of decisional law, has held that a determination on a constitutional question as to the legality of a measure proposed to be enacted into law by the people will be reached by this Court when raised by a party if, in the Court's opinion, reaching the issue may prevent the holding of a costly and unnecessary election. That finding has been reaffirmed by this Court on at least four subsequent occasions. In re *Initiative Petition No. 348, 820 P.2d 772, 780 (Okla. 1991); In re Initiative Petition No. 347*, 813 P.2d 1019, 1030 (Okla. 1991); In re *Initiative Petition No. 341*, 796 P.2d 267, 269 (Okla. 1990); and In re *Initiative Petition No. 315*, 649 P.2d 545, 547-48 (Okla. 1982) all solidly stand for the premise that if a properly preserved constitutional challenge is leveled at a proposed law and a ruling on the issue would prevent a useless election resulting in the enactment of an unconstitutional statute, this Court has the authority, as well as the responsibility, to decide the matter.

We cannot undervalue the importance of the constitutional right, under the Oklahoma Constitution, to initiative and referendum. Nor may we ignore our constitutional duty, In *Ralls v. Wyland*, 40 Okla. 323, 138 P. 158, 160 (1914), the Oklahoma Supreme Court held that:

> "The powers of the initiative and the referendum reserved to the people occupy a prominent place in the Constitution and laws of this state, and their act, when invoking such

powers, should be guarded by the courts, to the end that whatever is their due is kept inviolate. *In the exercise of such powers, it is necessary that the provisions of the Constitution should be adhered to.*" (Emphasis supplied.)

The very first article of the Oklahoma Constitution and its very first section acknowledge that the "State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land." The very first section of the Bill of Rights of the Okla. Const., art. 2 §1 limits the right of the initiative. It provides:

"All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and *they have the right to alter or reform the same whenever the public good may require it; Provided, such change be not repugnant to the Constitution of the United States.*" (Emphasis supplied.)

The proponents eleventh hour revelation that they apparently knew that Initiative Petition No. 349 was unconstitutional when it was drafted, circulated, and submitted only serves to raise additional questions about its legitimacy. Were prospective signers of the proposition informed of its unconstitutionality, and of its strategic role in a long-range strategy of political advocacy i.e., its "test case" status? Or conversely, were the signers led to believe that they were supporting a proposition that would enjoy legal validity if adopted by the voters?

There is nothing in the ballot title or anywhere else in the record before us from which we can discern that the ballot title was "in harmony with the law," or that it is "legally correct." The argument that the proposition should be placed before the voters, notwithstanding that it violates the law of the land as expressed in Casey, raises the additional issue of the treatment of those citizens who may support state-imposed limitations on abortions, but who are not inclined to vote for an unconstitutional measure. The Okla. Const. art. 5, §6 provides:

"Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters."[20]

Although initiative voters always must face the dilemma posed by the three-year rule, this dilemma is unnecessarily sharpened by the proponent's insistence on the submission of a patently unconstitutional measure where defeat will impair the initiative rights of those supporters who also support constitutional government. While this Court cannot monitor every aspect of every initiative campaign, it can express its concern about a post-circulation concession of unconstitutionality and its impact on this vital component of our political democracy.[21]

The proponents appear to assert that this "absolute right" to vote is derived from the First Amendment to the United States Constitution. At the same time, they concede that the right of initiative does not arise from the United States Constitution. Indeed, only twenty-three of our sister states provide this constitutional right. It seems self-evident that the exercise of a non-federal right can be conditioned by the same state constitution that creates and confers it. In this instance, art. 2, §1 of the Okla. Const. bars statutory enactments which violate the law of the land.

Assuming arguendo, the relevance of proponents' "core speech" argument in this context, it is obvious that these rights are not absolute. Judicial intervention to interdict a hypothetical state constitutional amendment prohibiting the free exercise of religion would "limit" the proponents "core speech" activities; however, no one would question the legitimacy of such a limitation.

We understand the proponent's characterization of their petition as "core political speech" as additional emphasis for the importance of the initiative process and for placing the proposition on the November ballot — and not as an attempt to raise a First Amendment claim. It is, in effect, an argument that their "free speech" rights to advocate an unconstitutional law outweigh constitutional rights of all other Oklahomans that the Oklahoma Constitution should not be

repugnant to the Constitution which we all share as Americans. The Oklahoma drafters were careful to frame a constitution which was in harmony with the constitution written by the founding fathers. Our reverence for the initiative rights guaranteed by the Oklahoma Constitution cannot be overstated. It is our profound belief that our rejection of the *Threadgill v. Cross*, 26 Okla. 403, 109 P. 558, 562 (1910) rule which held that the constitutionality of an initiative petition is not subject to review prior to its enactment by the voters, and our reaffirmation of constitutional law-making principles enhances those rights rather than diminishes them.

Not surprisingly, the proponents have not cited us to a single provision of federal or Oklahoma law which trammels their First Amendment rights under the federal constitution, and our own review discloses none. The proponents rely upon *Myer v. Grant*, 486, U.S. 414, 421, 108 S.Ct. 1886, 1891, 100 L.Ed.2d 425, 434-35 (1988)[22] for the proposition that a pre-submission judicial review of the constitutionality of Initiative Petition No. 349 violates "core political speech" protected by the First Amendment. The reliance on *Myer* is misplaced. In *Myer*, the United States Supreme court held that Colorado could not prohibit payment of persons hired to circulate initiative petitions. Here, the procedural issue of paying circulators is not presented. The manner in which the petition was circulated is not at issue. Nothing in this opinion should be read to limit the content of any petition circulated. However, if an unconstitutional measure garners enough signatures to be presented to the people and is challenged on constitutional grounds, pre-submission judicial review is appropriate.[23]

This Court's action is not based on the contents of the proponents' "speech"; rather, it responds to the lawfulness of that speech in the context of our fundamental law on initiative and referendum. Nothing in this Court's action precludes the proponents of legal limitations on abortion from bringing forward a proposal on that exact subject matter so long as the proposal conforms to the applicable legal requirements for initiative proposals. In this context, the

most basic requirement of the Oklahoma Constitution is that the change in law petitioned for be compatible with the United States Constitution as construed by the United States Supreme Court. It should also be noted that the proponents of change in federal constitutional law are entirely free to exercise their First Amendment rights in the arenas where federal law is shaped.

We noted in In Re *Petition No. 281, State Question No. 441*, 434 P.2d 941, 946 (Okla. 1967) that the real purpose of an initiative petition is to secure a vote of the people upon a proposed law or constitutional amendment. We also expressed the view that the repeal of any conflicting provisions of the law in effect at the time the proposed law is to become effective as being merely incidental to the purpose of the petition. This is not what is before us here. The proponents apparently take the position that they are not attempting to amend Oklahoma law. The goal clearly implicit in their "test case" strategy is a change in federal constitutional law. The initiative process guaranteed to our citizens by the Oklahoma Constitution was never intended to be a vehicle for amending the United States Constitution—nor can it serve that function in our system of government.[24]

The proponents also complain that because bills pending before the Legislature are not subject to pre-enactment judicial scrutiny for constitutional flaws, we should similarly defer consideration of this proposition until such time as the people have acted. This argument quite simply mixes apples and oranges, and it ignores the many longstanding and well-recognized differences between these two modes of lawmaking. Few, if any, of the pre-enactment requirements governing the initiative and referendum process are applicable to the legislative process, such as, for example:[25] circulating petitions, signature verifications, eighth-grade reading level of the ballot title, mandatory challenge periods, and submission to the Attorney General of the ballot title for review for "legal correctness." Likewise, many of the hurdles built into our legislative structure do not apply to initiatives and referenda: namely, passage by both houses, legislative committee consideration, and the availability of a gubernato-

rial veto. These are two very different processes and the proponents efforts to confuse them are misplaced.

The proponents also claim that the proposal here is different from the *Casey* restrictions. Yes, it is. It is different, most significantly, in that Initiative Petition No. 349 is so much more restrictive that it could not be enforced in a manner consistent with the Liberty Clause of the Fourteenth Amendment. (Subject to some procedural restrictions, the Pennsylvania statute[26] reviewed in *Casey* did not ban first trimester abortions.)

Even though the proponents continue to cling to *Threadgill v. Cross*, 26 Okla. 403, 109 P. 558, 562 (1910), this Court implicitly recognized in 1975, that the *Threadgill* doctrine was frequently nothing more than a rationalization for deferring obvious issues of constitutionality. The effect of this doctrine, especially when it involves transparently unconstitutional proposals, is subject to the perception by the citizens of our state that their votes, so eagerly solicited, are ultimately meaningless acts in an elaborate charade. The danger of *Threadgill* is that, in effect, citizens may be led to believe that their votes on matters of intense public concern count, when this Court is already fully aware that the proposed measure is subject to being struck down as unconstitutional within months should the voters approve it. Conversely, the vote on an indisputably unconstitutional measure will almost certainly be distorted by widespread citizen awareness of the invalidity of the measure. In any event, a truly meaningful vote on the initiative becomes impossible.

The underlying sense of our cases dating back to 1975 is that *Threadgill* trumpets a triumph of form over substance which calls into question the very legitimacy of the initiative process itself by merely postponing the inevitable. For seventeen years, the majority of this Court has understood that the *Threadgill* doctrine has been modified to the extent that it no longer operates as a bar to the pre-submission review of constitutional defects in initiative proposals.

Here, the initiative petition makes no allowance for a

woman's pre-viability decision on whether to obtain an abortion. If enacted, it could not withstand a *Casey*-based challenge; and, at best, it would serve as an expensive, nonbinding public opinion poll. Were we to allow the initiative to be submitted to the people, a costly, fruitless, and useless election would take place. The pragmatic approach to the consideration of constitutional issues begun in *Norman* strengthens rather than impairs the initiative process because voters are assured that their vote on a state question is meaningful. The utilization of pre-submission constitutional scrutiny guarantees that Oklahomans are neither "cut off at the pass" nor engaged in a game of "Kings-X" after they have exercised their most precious right—the right to vote.

CONCLUSION

The right of the initiative is precious and it is one which we are zealous to preserve to the fullest measure of the spirit and the letter of the law. All doubt as to the construction of pertinent provisions is resolved in favor of the initiative.[27] However, the right of the initiative is not absolute. There are constitutional and statutory limits on the process.[28] After *Casey*, it became incontrovertibly clear that the petition could not withstand a constitutional challenge. Although state law may afford greater rights that those guaranteed by federal law, it may not curtail rights guaranteed by federal law or the United States Constitution.[29]

If the people of Oklahoma want to vote on a valid enactment concerning abortion, they have the constitutional right to circulate another petition. However, it would be a disservice to the proponents, to the protestants, and to the citizens of this state to hold an election which could not withstand the immediate *Casey* challenge which would be bound to follow. At that time, this Court would be forced to declare the enacted proposition unconstitutional. The legal resources of the parties, the people of Oklahoma, and the judiciary would be better spent in considering a petition which is not void on its face.

INITIATIVE PETITION INVALID; ORDERED STRICKEN FROM THE BALLOT.

LAVENDER, SIMMS, KAUGER and
SUMMERS, JJ., concur;
WATT, J., concurs in Part I, concurs by reason of stare decisis in part II;
HODGES, VCJ. and
HARGRAVE, J., concur in part and disent in part;
OPALA, CJ. and
WILSON, J., dissent.

[1] Successor Attorney General during the pendency of the appeal.

[2] The United States Const. amend. XIV, §1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment is enforceable against the states. When the United States Supreme Court speaks on matters of federal constitutional law, state courts are bound under the Fourteenth Amendment to follow its mandate. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081, 1090 (1961).

[3] Initially, Feldman raised a myriad of constitutional challenges. However, when Feldman filed the brief in support of the protest to the petition, all constitutional challenges *except those relating to federal constitutional laws* were waived. The federal constitutional issues were raised to demonstrate that even if the Initiative Petition were approved by the people, it could not survive a constitutional challenge and would be ineffective to regulate first and second trimester abortions. Sellers responded to the constitutional challenges.

[4] We are bound under the United States Const. art VI, cl. 2 and the Okla. Const. art. 1, §1 to follow the United States Constitution as the supreme law of the land. We are required under 12 O.S. 1991 §2201(A) to take judicial notice of the United States Constitution and the Constitution of the State of Oklahoma. Even if this were not so, in matters of *publici juris*, the Court may on its own raise and determine the issue. As Chief Justice Opala wrote for the majority of the Court in *Matter of McNeely*, 734 P.2d 1294, 1296 (Okla. 1987):

> "...The dispositive issue here—one of public law—was neither raised nor briefed by the parties. When public-law issues are present this court may, on review, resolve them by application of legal theories that were not tendered below...."

See also, *Davis v. Davis*, 708 P.2d 1102, 1104 (Okla. 1985) (Overruled on other grounds.), also authored by Chief Justice Opala for the majority of the Court.

Title 12 O.S. 1991 §2201 provides in pertinent part:

"A. Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States...."

[6] See, S. Hewett, *"Hodgson v. Minnesota*: Chipping Away at *Roe v. Wade* in the Aftermath of *Webster*," 18 Pepperdine L.Rev. 955, 995 (1991); C. Forsythe, "A Legal Strategy to Overturn *Roe v. Wade* After *Webster*: Some Lessons from Lincoln," 1991 B.Y.U.L. Rev. 519, 520-21 (1991); E. Brueschke & J. Brueschke, "Constitutional Law: The Future of the Abortion Controversy & the Role of the Supreme Court After *Webster v. Reproductive Health Services*," 43 Okla. L.R. 481, 513 (1990); W. Dellinger & G. Sperling, "Colloquy - Webster v. Reproductive Health Services: Abortion & the Supreme Court: The Retreat from *Roe v. Wade*," 138 U.Pa. L.Rev. 83, 89 (1989); P. Prieto, *"City of Akron v. Akron Center for Reproductive Health, Inc.*: Stare Decisis Prevails, but for How Long?" 38 U. Miami L.Rev. 921, 938 (1984).

[7] Thereafter, the Supreme Court decided *Ohio v. Akron Center*, 497 U.S. ___, ___, ___, 110 S.Ct. 2972, 2979, 111 L.Ed.2d 405, 418 (1990) and *Rust v. Sullivan*, 500 U.S. ___, ___, 111 S.Ct. 1759, 1768, 114 L.Ed.2d 233, 250 (1991). The Supreme Court upheld a parent notification provision containing a by-pass provision in *Akron Center*. In *Rust*, the Supreme Court upheld regulations promulgated by the Department of Health and Human Services prohibiting grantees under Title X from engaging in abortion counseling, referral, and advocacy. These cases along with *Webster's* apparent foreshadowing that the holding in *Roe* was subject to reexamination, left the constitutional issues presented by the initiative petition questionable.

[8] The Court wrote in part IID of *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518, 109 S.Ct. 3040, 3052, 106 L.Ed.2d 410, 435-36 (1989):

> "...We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in Roe has resulted in subsequent cases like Colautti and Akron making constitutional law in this area a virtual Procrustean bed.... We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice'.... (T)he rigid Roe framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the Roe framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a

code of regulations rather than a body of constitutional doctrine...."

[8] Our discussion of *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795, 4805 (U.S. June 29, 1992), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1992), is predicated on what a majority of the United States Supreme Court concluded in parts I and II of the opinion. Justices Blackmun and Stevens joined the authors in these portions of *Casey* and in parts III, V-A, V-C, and VI. When an opinion is delivered by a divided United States Supreme Court, the rule for determining the holding of the Court is laid down in *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L.Ed.2d 260, 265-66 (1977) in which the Court said:

"...When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds..."

In a judgment upholding a statute, the narrowest grounds are those which uphold the fewest statutes as constitutional. Conversely, when the rule is applied to striking down a statute, the narrowest grounds are those invalidating the fewest statutes as unconstitutional.

[9] *Planned Parenthood v. Casey*, see note 8 at 4802-03, supra.

[10] The United States Supreme Court upheld some restrictions on the right to obtain an abortion—an informed consent provision, a one-parent consent with a judicial by-pass procedure for minors, and a 24-hour waiting period—while preserving the basic right to obtain an abortion.

[11] *Planned Parenthood v. Casey*, see note 8 at 4798-99, supra.

[12] Section 5 of the petition provides:

"Abortion shall not be a crime under the following circumstances:

(A) (1) The abortion was necessary to save the life of the female or to avoid a grave impairment of the female's physical or mental health;

(2) For the purpose of determining grave impairment of a female's mental health in Section 5(A)(1), impairments or stresses produced by an unwanted birth, social stigma or embarrassment, interruption of life plans, or lack of financial resources, which have not resulted in psychosis or major depressive illness, shall not constitute grave mental impairment;

(B) The pregnancy resulted from rape as defined by Title 21, Section 1111 of the Oklahoma Statutes;

(C) The pregnancy resulted from incest as defined by Title 21, Section 885 of the Oklahoma Statutes; or

(D) The unborn child would be born with a grave physical or mental defect."

[13] Section 4 of the petition provides in pertinent part:

"(A) Except as provided in Section 5, a person commits the crime of abortion if:

(1) Such person performs an abortion upon another person; or...

(2) Such person intentionally or knowingly aids or abets the performing of an abortion upon another person....

(B) Every natural person guilty of the crime of abortion is punishable by imprisonment in the penitentiary for not less than four (4) years.

(C) Any person, other than a natural person, guilty of the crime of abortion is punishable by a fine not less than Ten Thousand Dollars ($10,000.00) but not exceeding One Hundred Thousand Dollars ($100,000.00)."

[14] The Okla. Const. art. 1, §1.

[15] See, *State of Carolina v. Bailey*, 289 U.S. 412, 420, 53 S.Ct. 667, 670-71, 77 L.Ed. 1292, 1296 (1933); *McLin v. Trimble*, 795 P.2d 1035, 1038 (Okla. 1990); *State v. Board of Control*, 83 S.2d 20, 23 (Fla. 1955).

[16] The Okla. Const. art. 15, §1.

[17] Section 5 of the petition, see note 12, supra.

[18] See, In re *Initiative Petition No. 347*, 813, P.2d 1019, 1030 (Okla. 1991); In re *Initiative Petition No. 315*, 649 P.2d 545, 548 (Okla. 1982); *Tulsa Exposition & Fair Corp. v. Board of County Comm'ns*, 468 P.2d 501, 507 (Okla. 1970); *Battles v. State* ex rel *Oklahoma Comm'n for Crippled Children*, 206 Okla. 444, 244 P.2d 320, 323-34 (1952); *Atchison, T. & S.F. Ry. v. Long*, 122 Okla. 86, 251 P. 486, 491-92 (1926).

[19] Title 34 O.S. 1991 §10 provides in pertinent part:

"A. Any person who is dissatisfied with the wording of a ballot title may, within ten (10) days after the same is filed by the Attorney General with the Secretary of State as provided for in Section 9 of this title, appeal to the Supreme Court by petition in which shall be offered a substitute ballot title for the one from which the appeal is taken. Upon the hearing of such appeal, the court may correct or amend the ballot title before the court, or accept the substitute suggested, or may draft a new one which will conform to the provisions of Section 9 of this title...."

[20] Initially, pursuant to the Okla. Const. art. 5, §2, only 8% of the legal voters are required to propose legislative measures, and 15% to propose constitutional amendments.

[21] The Okla. Const. art. 5, §8 states that:

"Laws shall be provided to prevent corruption in making, procuring, and submitting initiative and referendum petitions."

[22] The only other material presented by the proponents in support of the "core political speech" argument are Justice Scalia's dissenting opinion in *Planned Parenthood v. Casey*, see note 8 at 4842, supra; and a concurring opinion authored by Chief Justice Opala in In re *Initiative Petition No. 347*, see note 18 at 1040, supra. Neither of the positions expressed in these special writings could garner a majority vote of either of the respective courts.

[23] In re *Initiative Petition No. 348*, 820 P.2d 772, 780 (Okla. 1991); In re *Initiative Petition No. 347*, see note 18, supra; In re *Initiative Petition No. 315*, see note 18, supra; In re *Supreme Court Adjudication of Peti-*

tions in Norman, Oklahoma, 534 P.2d 3, 8 (Okla. 1975).

[24] The idea that proponents of change in the federal constitution can select their own means of doing so is not a new one. Although it dealt with a procedural issue, it is important to recognize that the United States Supreme Court and the Oklahoma Supreme court acknowledge that the federal constitution cannot be amended other than as provided in the federal constitution. The Oklahoma Supreme Court in *State v. Morris*, 79 Okla. 89, 191 P. 364-65 (1926) cited with approval *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920) when it refused to submit the 19th amendment (the prohibition amendment), which had been ratified by the Oklahoma Legislature, to a vote of the people. The *Morris* Court held that:

> "Referendum provisions of state Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the federal Constitution without violating the requirement of article 5 of such Constitution, that such ratification shall be by the Legislatures of the several states, or by conventions therein, as Congress shall decide."

[25] See, 34 O.S. 1991 §9.

[26] Title 18 Pa.Cons.Stat.Ann. §3203 (Purdon 1982); 18 Pa.Cons.Stat.Ann. §3211 (Purdon 1988).

[27] *Oliver v. City of Tulsa*, 654 P.2d 607, 613 (Okla. 1982).

[28] The United States Const. art. VI, cl. 2; Okla. Const., art. 1, §1 art. 2, §1 and art. 5, §6; In re *Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990). See, *Community Gas & Serv. Co. v. Walbaum*, 404 P.2d 1014, 1016 (Okla. 1965).

[29] *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040-41, 64 L.Ed. 2d 741, 751-52 (1980). The following jurisdictions which have considered the issue of abortion have afforded greater individual rights to their citizens under state constitutions than those recognized under the federal constitution. *Preterm Cleveland v. Voinovich*, 1992 LEXIS 1, 5 (Ohio 1992); *Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134, 152 (1986); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925, 932 (1982); *Moe v. Secretary of Admin.*, 382 Mass. 629, 417 N.E.2d 387, 400 (1981); *Committee to Defend Reproductive Rights v. Myer*, 29 Cal.3d 252, 172 Cal. Rptr. 866, 625 P.2d 779, 796 (1981); *Doe v. Director of Dept. of Social Serv.*, 187 Mich.App. 493, 468 N.W.2d 862, 870 (1991); *Hope v. Perales*, 150 Misc. 2d 985, 571 N.Y.S.2d 972, 979 (1991). We are not called upon here to do so, nor will we speculate concerning the scope of individual liberty under the Okla. Const. art. 2, §2 or under the Okla. Const. due process clause, art. 2, §7.

OPALA, CJ., (dissenting) This case is *not* about the status of the United States Constitution as the *supreme law* of the land;[1] *not* about the invalidity of *law* that is repugnant to the United States Constitution;[2] *nor* even about this court's

power to invalidate constitutionally nonconformable *law*. The question before us is rather whether this court should free itself from the restraining hand of *Threadgill*[3] to now impose constitutional orthodoxy *not only on law* that is in force but also on an as-yet-unenacted measure in the political process of initiative lawmaking. To this question I would give a categorically negative answer. The extratextual power of federal and state courts to invalidate law at variance with the constitution's command — now about 190 years old — may not be used to create a form of court-impressed censorship purging from open and public debate and excising from the marketplace of available ideas *novel* policy solutions that might meet with current judicial disfavor. Debates on constitutional issues are not judicially bannable from public fora nor are they outside the protection accorded political speech. Judicial pre-enactment scrutiny of proposed legislation for constitutional flaws raises an impermissible restraint on the free exercise of political speech.[4] Judges serve as stewards of constitutional purity *in law*, but *do not also function as government agents enforcing constitutional orthodoxy upon the political process of lawmaking*. Unlike *enacted law*, lawmaking in progress need not meet constitutional orthodoxy. The people of this State require no *official censor to give his imprimatur* for the *content* of a measure to be proposed by initiative petition.[5] The judiciary's self-imposed restraint from invading the arena of political decision-making should not be abandoned for the sake of preventing elections upon policy issues that courts may ultimately trump. Only in the clearest case of *firmly settled* and *stable* federal constitutional jurisprudence that *absolutely* condemns the proposed measure as facially impossible of enforcement, application or execution--and then *only* if the protestants have standing to complain of constitutional infirmity—would this court ever be justified in not clearing an initiative petition for submission to a vote of the people. *This case falls far short of that category.*

The court declares that the initiative measure under consideration—which would prohibit abortions except in four instances and would impose *criminal penalties* for the

proposed law's violation—does not qualify for submission to a vote of the electorate because it affords pregnant women less rights than those guaranteed them by the United States Constitution in *Planned Parenthood v. Casey*.[6] The court waters down *Threadgill*, a vintage Oklahoma authority, which teaches that in advance of a measure's adoption as law an initiative petition's content may not be tested in a judicial forum for constitutional conformity.

Because the court's answer is contrary to that I would give today, I recede from its pronouncement. I would stand by the full force of *Threadgill* as viable precedent to protect the people from impermissible judicial restraint on free political speech; I would not let *Casey* trump this measure's submission because protestants' *Casey* challenge is barred by their lack of standing and by the prudential rule; I would scrutinize the initiative petition before us *but only* for compliance with the *sine qua non* procedural requirements for submission; I would hold today that if this measure is adopted, it will, when challenged on constitutional grounds, undergo the *Casey* test or some other test *then* in jurisprudential vogue.

I

LEGAL BARRIERS TO THE COURT'S USE OF THE *CASEY* TRUMP

A.

THREADGILL[7] AND ITS PROGENY

Threadgill, which enjoyed *full* and *unlimited* sway from 1910 until 1975,[8] teaches that an initiative petition need only pass a procedural threshold test to qualify for submission to a vote of the people. It must (a) be in substantial compliance with the *sine qua non procedural* requirements for submission and bear the requisite number of valid signatures, (b) address but a single subject[9] and (c) be upon a subject not explicitly excluded from the people's lawmaking power.[10] Unless a fatal procedural impediment be found, the petition must be cleared for a vote. All constitutional challenges to the

content must await the measure's adoption as *enforceable law in the context of a lively forensic controversy between antagonistic adversaries with legal standing to press challenges.*[11]

Threadgill should be *kept in full force because it raises a necessary barrier of insulation between judicature and initiative lawmaking. The former is a function of judges, the latter of the people.*

B.

THE "PRUDENTIAL RULE"

The prudential rule of necessity, adhered to by all state and federal courts, *commands* that constitutional issues not be resolved in advance of strict necessity.[12] Pre-enactment testing of proposed legislation clearly offends the prudential rule. Measures in the process of lawmaking are not subject to court-enforced constitutional orthodoxy.

I would not today relax the prudential rule to consider the protestants' *Casey* challenge to an *unenacted* measure.

C.

PROTESTANTS LACK STANDING FOR A *CASEY* CHALLENGE

Were I now to depart from my firm commitment to *Threadgill*, I still could not join today's rush to a constitutional judgment. Protestants do not meet either the federal or the state standards for standing to press their *Casey* challenge. *No person can be adversely affected by, or have a litigable interest in, a measure that is not enforceable against anyone as law.* No showing of actual or threatened injury can be made *vis-a-vis* a measure that is not law.

D.

OKLAHOMA'S STANDING REQUIREMENTS

Standing, the legal right of a person to challenge the con-

duct of another in a judicial forum,[13] may be raised at any level of the judicial process or by the court on its own motion.[14] It must be predicated on interest that is "direct, immediate and substantial."[15] The concept of standing focuses on whether the party invoking the court's jurisdiction has a legally cognizable interest in the outcome of the controversy.[16] A party seeking relief must show actual or threatened injury of some kind.[17] The inquiry is whether *the party has in fact suffered injury to a legally protected interest within the contemplation of statutory or constitutional provisions.*[18] Under these standards of our law protestants lack standing to assert a *Casey* challenge to an *unenacted* initiative measure.

E.

FEDERAL STANDING REQUIREMENTS

The standing doctrine imposes two types of restrictions on litigants seeking access to federal courts: "constitutional limitations on federal courts' jurisdiction and prudential limitations on its exercise."[19] "In its *constitutional dimension*, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit."[20] The requirement is met where the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action...."[21] The *prudential aspect* of the standing inquiry, like the constitutional aspect, derives fundamentally from "concern about the proper — and properly limited — role of the courts in a democratic society."[22] Generally, the plaintiff can only assert "his or her own legal interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[23] These limitations assure that a court does not issue "unnecessary pronouncement[s]" on constitutional issues[24] and that the issues before the court "will be concrete and sharply presented."[25]

Federal standing requirements are aptly illustrated in *Poe v. Ullman*[26] and *Tileston v. Ullman*.[27] There the Court dis-

missed appeals on nonjusticiability and lack-of-threatened-prosecution grounds. The *Poe* plaintiffs sought to enjoin the enforcement of a criminal statute prohibiting the sale of contraceptives. *Poe* teaches that a litigant must show a threat of prosecution that is both real and immediate before a federal court may examine the validity of a criminal statute.[28] Nonjusticiability came to be rested on two factors — only one attempt to enforce the offending ban had been made during its seventy-five year history and the contraceptives were "commonly and notoriously sold in Connecticut drug stores."[29] If the Court in *Poe* refused to test the constitutionality of a criminal statute that went unenforced and "stood toothless" for decades, *with what show of reason can this court today allow itself to probe into a measure that is not even law? Tileston,*[30] which is authority for the general and well-recognized principle that a litigant cannot have standing based upon the assertion of others' rights,[31] was reinforced in *Warth v. Seldin.*[32] There the Court states that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, ...the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[33]

Poe and *Tileston* illustrate that standing requires a "Hohfeldian plaintiff" — i.e., one with a personal interest that is threatened by the state.[34] These protestants are non-Hohfeldian plaintiffs because they have no personal interest endangered by the unenacted measure.[35] They are not women whose intended termination of pregnancy is immediately threatened or impaired by state action in enforcing a constitutionally infirm criminal statute. I would not relax our standing requirements, identical to those in federal courts, to entertain the protestants' *Casey* challenge.

II

WERE I NOW TO DEPART FROM MY UNSWERVING COMMITMENT TO *THREADGILL* AND WERE I ALSO TO IGNORE OUR STANDING

DOCTRINE AND THAT OF THE UNITED STATES SUPREME COURT, I STILL COULD NOT JOIN THE COURT'S OPINION BECAUSE *PRIMARY JURISDICTION* OVER THE CONSTITUTIONAL VALIDITY OF THIS PROPOSED PENAL ANTI-ABORTION MEASURE IS REPOSED BY LAW IN THE COURT OF CRIMINAL APPEALS

A.

THE PROPOSED ANTI-ABORTION MEASURE IS A PENAL STATUTE WHOSE CONSTITUTIONAL FITNESS LIES WITHIN THE *EXCLUSIVE* JURISDICTION OF THE COURT OF CRIMINAL APPEALS

There is another reason to defer this measure's consideration for constitutional testing until its adoption as law. The measure tested today in advance of its passage is at best a penal statute[36] whose constitutional fitness lies within the exclusive jurisdiction of the Court of Criminal Appeals.[37]

Extant Oklahoma case law gives a clear exposition of the dichotomy that governs our civil and criminal appellate cognizance.[38] The court of Criminal Appeals has the *exclusive* power over matters incident or essential to the complete exercise of its appellate jurisdiction in criminal cases.[39] In *Walters v. Ethics Com'n.*[40] we abstained from taking jurisdiction over a matter relating substantially to criminal law or procedure. Final decisions upon the meaning of a penal enactment may not be made by any appellate tribunal other than the Court of Criminal Appeals.[41] This applies with equal force to a criminal-law measure in progress of adoption by the initiative process.

B.

WHEN ON APPEAL OR IN AN ORIGINAL PROCEEDING AN ISSUE WHICH LIES WITHIN ANOTHER COURT'S JURISDICTION IS RAISED, IT MUST BE REFERRED TO THAT COURT UNDER

THE PRIMARY JURISDICTION DOCTRINE

If this court should continue to test for constitutional conformity unenacted penal measures in initiative lawmaking process, it should defer the question at hand to the Court of Criminal Appeals. Two constitutional power sources would allow a criminal-law issue properly before us to be deferred to the Court of Criminal Appeals — Art. 7, §6,[42] and Art. 7, §4, Okl.Const.[43] Section 6, which makes the Court of Criminal Appeals subject to the administrative control of the Oklahoma Supreme Court, gives us the authority to transfer either a whole case or a part of one. Under §4's constitutionally mandated division of appellate cognizance, whenever there is a dispute over a jurisdictional issue, this court decides which of the two tribunals shall take jurisdiction over the case.[44]

Our authority to certify an issue to another court may be likened to the *primary jurisdiction doctrine* that governs the allocation of cognizance between a federal court and one of the government's administrative agencies.[45] Primary jurisdiction doctrine is used where a *claim is originally cognizable in federal courts.* It comes into play whenever enforcement of the claim requires *issues to be resolved which have been placed within the special competence and specialized knowledge of an administrative body.*[46] A district court's judicial process will be suspended pending disposition of the deferred issues by the administrative body.[47] This court appears to have invoked the primary jurisdiction doctrine without adopting it by name.[48]

Here, the doctrine of primary jurisdiction should be crafted to facilitate our jurisdictional co-existence with the other appellate court of last resort. The doctrine's application would be necessary for this court to continue dealing with disputes which, although generally within its cognizance, call for a criminal-law analysis. An initiative petition contest is noncriminal. It cannot be transferred to the Court of Criminal Appeals. But the criminal-law aspect of this anti-abortion measure must undergo the other court's criminal-law analysis. Its answer should be binding on us here.

The court invalidates today a proposed criminal statute. It could with no less show of reason also claim for itself the authority *to validate* a penal enactment. In so doing it might run into conflict with a later contrary pronouncement of the Court of Criminal Appeals. Wisdom counsels a course that would defer the criminal-law aspect of the *Casey* trump to the Court of Criminal Appeals.

III

CONSTITUTIONAL ORTHODOXY MAY NOT BE IMPRESSED ON THE POLITICAL PROCESS OF INITIATIVE LAWMAKING

The process of changing statutory law or the state's constitution by initiative petition is a form of lawmaking. Lawmaking is a political process. Judges cannot police or censor that process for conformity to the constitution without raising an impermissible restraint on free exercise of political speech.[49] Initiative process *is not used* when it is invoked to advocate changes in the federal constitutional jurisprudence or to influence and press for congressional amendments to the United States Constitution. Even if *Casey* were to prove itself immortal and immutable, a popular assault on the *Casey* citadel is well within the protection of Art. 5, §§1-8, Okl.Const. — the state constitutional provisions for initiative lawmaking. Today's opinion impermissibly imposes the rigidity of the current constitutional orthodoxy on the use of initiative process and prevents the people from having access to that genre of lawmaking as a legitimate means of testing the continued popularity of current political values to effect their legitimate change. Neither the federal constitution nor the United States Supreme Court's exposition of that document is set in permanent stone. Today's disregard for *Threadgill's* rationale gives less latitude to the electorate's effort at lawful change by political advocacy than does our own code of ethics for lawyers. That code specifically protects from judicial sanction a lawyer's advocacy for reasonable "extension, modification, or reversal of existing law."[50] We thus give lawyers a wider sweep of First

Amendment freedom than we do to the sovereign electors of Oklahoma acting in the exercise of initiative lawmaking power. By denying their quest for an opportunity to test the constitutional frontiers of *Roe*[51] and *Casey*[52] the court deprives these proponents of a legitimate means by which to press political advocacy.

Today's decision *trumps political process rather than law.* Public debate on an unenacted measure and the electorate's claim to its adoption is every bit as protected by §22[53] as is a proposed bill before either of the two legislative chambers. Although today's axe strikes at a measure initiated outside the legislative chambers, the principle the court announces arms it with powers also to require fundamental-law conformity — to be enforced without the usual procedural safeguards of the prudential rule and of standing requirements — of a bill in progress of enactment or of a state constitutional amendment proposed by the legislature under Art. 24, §1, Okl.Const.[54]

Our fundamental law explicitly proscribes judicial tinkering with the election process. Art. 3, §5,[55] and Art. 2, §4, Okl.Const.[56] These constitutional provisions protect both the election and the right of franchise from excessive use of judicial power.[57] Today's *Casey*[58] trump of the anti-abortion measure offends both Art. 3, §5, and Art. 2, §4.

SUMMARY

I must remain true to my commitment to the teachings of *Threadgill.* I would not in advance of submission and adoption test for constitutional orthodoxy the content of an initiative petition.[59] The electorate's effort at legislating directly and its unenacted measures should not undergo judicial scrutiny unless the petition is attacked for *noncompliance with the sine qua non procedural requirements for submission.* Nor would I entertain federal constitutional challenges broader than those redressable in federal courts when the case stands in a like forensic procedural framework. As I have done many times before,[60] so once again today I appeal for the court's return to the adjective-law

regime that does not allow constitutional scrutiny of unenacted measures. Even if I were now to depart from my *Threadgill* commitment and also throw to the winds the teaching of standing, state and federal, and the prudential rule as well as all other barriers to deciding purely academic questions, I still could not join today's opinion. This court lacks jurisdiction to test the constitutional fitness of a criminal statute. If it should persist on its path of policing unenacted penal measures for fundamental-law conformity, I would counsel that it invoke the primary jurisdiction doctrine to certify to the Court of Criminal Appeals the criminal-law aspect of the initiative controversy.

The court rests its decision on rather unstable United States constitutional jurisprudence that may change with each confirmation process.[61] Today's pronouncement deprives the proponents of a legitimate use of initiative lawmaking process to advocate a change in the federal constitutional jurisprudence or press for a congressional amendment that would redress their grievance. Lastly, I must counsel against today's use of constitutional orthodoxy to raise an impermissible restraint on the free exercise of political speech.

[1] That status is secured by the terms of Art. 1, §1, Okl.Const., which provide:

"The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

[2] That principle is dealt with in the terms of Art. 2, §1, Okl.Const., which provide:

"All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change be not repugnant to the Constitution of the United States."

[3] Threadgill v. Cross, 26 Okl. 403, 109 P. 558 (1910).

[4] Advocacy for or against a proposed law is the purest form of political speech. Restraint upon free speech is prohibited by the terms of Art. 2, §22, Okl.Const., which provide in part:

"Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right;...."

[5] The constitutional provisions governing the initiative and referen-

dum are Art. 5, §§1-8, Okl.Const. Section 1 provides:

> "The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but *the people reserve to themselves the power to propose laws and amendments* to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." (Emphasis added.)

In Oklahoma Tax Commission v. Smith, Okl., 610 P.2d 794, 807 (1980), we stated that Art. 5, §§1, 2 and 7, together "comprise an initiative system whereby both the people and the Legislature may propose legislation independently, and neither *can block the effort of the other during the process*...." Our teaching in *Smith* applies with equal force to bar judicial as well as legislative interference with initiative process. Courts should be loath to impose judicial restraint on the electorate's power to make law. As the Arizona Supreme Court aptly remarked in State v. Osborn, 16 Ariz. 247, 143 P. 117, 118 (1914), to place court-imposed restrictions "would be tantamount to claiming the power of life and death over every initiated measure by the people. It would limit the right of the people to propose only valid laws, whereas the other lawmaking body, the Legislature, would go untrammeled as to the legal soundness of its measures."

[6] ___U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1992.)

[7] *Supra* note 3. My commitment to *Threadgill, supra* note 3, is reported in several prior decisions. *See* In Re Initiative Petition No. 348, Okl., 820 P.2d 772, 781, 782 n.4 (1991) (Opala, C.J., concurring in result); In re Initiative Petition No. 347, State Question No. 639, Okl., 813 P.2d 1019, 1037 (1991) (Opala, C.J., concurring); In re Initiative Petition No. 349 (No. 76,437, February 20, 1991) (Opala, C.J., concurring in part and dissenting in part); In re Initiative Petition No. 341, Okl., 796 P.2d 267, 275 (1990) (Opala, V.C.J., concurring in result); In re Initiative Petition No. 317, Etc., Okl., 648 P.2d 1207, 1222 (1982) (Opala, J., concurring in the judgment); In re Initiative Petition No. 315, Etc., Okl., 649 P.2d 545, 554-555 (1982) (Opala, J., concurring in result).

[8] In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma, Okl., 534 P.2d 3 (1975) [Norman]. As I view *Norman* its teaching is consistent with *Threadgill* but its language a bit broader than the holding. To me, *Norman* trumped an initiative measure that dealt with a subject excluded from the power of initiative lawmaking. My *own analysis of Norman places that pronouncement well within Threadgill's rationale. Post-Norman cases appear to assume our total departure from the teaching of Threadgill.*

[9] In re Initiative Petition No. 344, Okl., 797 P.2d 326, 330 (1990); In re Initiative Petition No. 342, Okl., 797 P.2d 331, 333 (1990).

[10] *Norman, supra* note 8; *see also in this connection* In re Initiative Petition No. 347, *supra* note 7 (Opala, C.J., concurring).

[11] *See* Grodin, *In Pursuit of Justice* at 106 (Univ. of Cal. Press 1989);

Gordon and Magleby, PreElection Judicial Review of Initiatives and Referendums, 64 Notre Dame L.R. 298, 302 (1989); *see in this connection* Grossman, The Initiative and Referendum Process: The Michigan Experience, 28 Wayne L.Rev. 77, 111 (1981); Note, The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?, 53 Fordham L. Rev. 919, 921-22 (1985).

[12] In re Snyder, 472 U.S. 634, 642-643, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-502, 105 S. Ct. 2794, 2801, 86 L.Ed. 2d 394 (1986); I.N.S. v. Chadha, 462 U.S. 919, 937, 103, S.Ct. 2764, 2776, 77 L.Ed.2d 317 (1983); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); In Re Initiative Petition No. 347 State Question No. 639, *supra* note 7 at 1037 (Opala, C.J., concurring); Smith v. Westinghouse Elec. Corp., Okl., 732 P.2d 466, 467 n.3 (1987); Schwartz v. Diehl, Okl., 568 P.2d 280, 283 (1977); Dablemont v. State, Department of Public Safety, Okl., 543 P.2d 563, 564-565 (1975); *see also* Davis v. B.F. Goodrich, Okl., 826 P.2d 587, 593-594 (1992) (Opala, C.J., concurring); In re Initiative Petition No. 348, *supra* note 7 at 781, 782 n.4 (Opala, C.J., concurring in result); Johnson v. Walters, Okl., 819 P.2d 694, 708, 712 n.26 (1991) (Opala C.J., concurring in part and dissenting in part); State ex rel. Okl. Bar Ass'n v. Lobaugh, Okl., 781 P.2d 806, 813 (1988) (Opala, J., dissenting); In Re Initiative Petition No. 341, *supra* note 7 at 275 (Opala, V.C.J., concurring in result).

[13] State ex rel. Cartwright v. Okl. Tax Com'n, Okl., 653 P.2d 1230, 1232 (1982); Matter of Adoption of Baby Boy D, Okl., 742 P.2d 1059, 1062 (1987). "...[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

[14] Matter of Estate of Doan, Okl., 727 P.2d 574, 576 n.3 (1986).

[15] Underside v. Lathrop, Okl., 645 P.2d 514, 517 (1982); Democratic Party of Oklahoma v. Estep, Okl., 652 P.2d 271, 274 n. 13 (1982); Matter of Estate of Doan, *supra* note 14 at 576.

[16] Application of State ex rel. Dept. of Transp., Okl., 646 P.2d 605, 609 - (1982); *Estep*, *supra* note 15; *Cartwright*, *supra* note 13 at 1232; Independent School Dist. No. 9 v. Glass, Okl., 639 P.2d 1233, 1237 (1982); *Doan*, *supra* note 14 at 576. "...[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." Flast v. Cohen, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968); Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

[17] O'Shea v. Littleton, 414 U.S. 488, 493-494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).

[18] Matter of Adoption of Baby Boy D, *supra* note 13 at 1062; Independent School Dist. No. 9 v. Glass, *supra* note 16 at 1237.

[19] *Warth, supra* note 13, 422 U.S. at 499, 95 S.Ct. at 2205.

[20] *Warth, supra* note 13, 422 U.S. at 498, 95 S.Ct. at 2205; Singleton v. Wulff, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976).

[21] *Warth, supra* note 13, 422 U.S. at 499, 95 S.Ct. at 2205) (*citing*, Linda R.S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148-1149, 35 L.Ed.2d 536 (1973); *see, e.g.*, Data Processing Service v. Camp, 397 U.S. 150, 151-154, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970). The constitutional prong requires, at the very least, an actual injury redressable by the court. Director, Office of Workers' Comp. Programs v. Perini North River Assocs., 459 U.S. 297, 103 S.Ct. 634, 641, 74 L.Ed.2d 465 (1983).

[22] *Warth*, supra note 13, 422 U.S. at 498, 95 S.Ct. at 2205; *see* Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943).

[23] *Warth, supra* note 13, 422 U.S. at 499, 95 S.Ct. at 2205, citing, *Tileston, supra* note 22, and United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). The harm asserted cannot be a generalized grievance shared by the majority of the populace. *Warth, supra* note 13.

[24] Secretary of State of Md. v. J.H. Munson Co., 467 U.S. 947, 955, 104 S.Ct. 2839, 2846, 81 L.Ed.2d 786 (1984).

[25] *Munson, supra* note 24, 467 U.S. at 955, 104 S.Ct. at 2846, citing Baker v. Carr, *supra* note 16, 369 U.S. at 204, 82 S.Ct. at 703.

[26] 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

[27] *Supra* note 22.

[28] In *Poe* the Court held the constitutional challenge to a Connecticut penal statute banning the use of contraceptives presented no controversy justifying the adjudication of a constitutional issue. The plurality opinion based the appeal's dismissal on nonjusticiability for lack of a real and immediate threat of prosecution. Another opinion deemed the appeal to be dismissible for want of ripeness. Whether for want of justiciability or ripeness, the majority in Poe clearly found that case unfit for judicial consideration as a controversy. The appellants' (married couples and their physician) complaints in these state declaratory judgment proceedings were held not to allege a threat of prosecution for use of or for giving advice concerning contraceptive devices. The allegations referred to a prosecutor's statement that he intends to prosecute any offenses against state law and his claims that use of and advice concerning contraceptives would constitute offenses. The lack of immediacy of the threat described by these allegations, the Court opined, might alone raise serious questions of nonjusticiability of appellants' claims. *See* United Public Workers of American (C.I.O.) v. Mitchell, 330 U.S. 75, 88, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1946).

[29] *Poe, supra* note 26, 367 U.S. at 502, 81 S.Ct. at 1755.

[30] *Supra* note 22.

[31] There, a physician sought judgment declaring the state anti-abortion statute unconstitutional because it endangered the lives of certain of his patients and thereby violated their 14th Amendment rights. The U.S. Supreme Court dismissed the physician's appeal for lack of

standing because he was not suing to vindicate his own legal rights under state law, but rather those of his patients. The physician alleged (a) that the statute, if applicable to him, would prevent his giving professional advice concerning the use of contraceptives to three patients whose health condition was such that their lives would be endangered by childbearing and (b) that the appellees, state law enforcement officers, intend to prosecute any offense against the statute and "claim or may claim" that the proposed professional advice would constitute such an offense. The complaint set out in detail the danger to the lives of the physician's patients in the event that they should bear children, *but contained no allegations asserting any claim under the 14th Amendment of infringement of the physician's liberty or his property rights.* In *Tileston*, the Court observed that "[t]he sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life — obviously not [the physician's] but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf." *Tileston, supra* note 22, 318 U.S. at 46, 63 S.Ct. at 494.

[12] *Supra* note 13.

[13] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982) (quoting *Warth*, supra note 13, 422 U.S. at 499, 95 S.Ct. at 2205); United States v. Raines, *supra* note 23, 362 U.S. at 22, 80 S.Ct. at 523 (a litigant must generally assert his own constitutional rights and immunities). Without such limitations "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth, supra* note 13, 422 U.S. at 500, 95 S.Ct. at 2206.

Justice Black's observations in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), *are especially pertinent to this controversy:*

> "Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, *the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary." Id.* 401 U.S. at 52-53, 91 S.Ct. at 754 (emphasis added).

[14] In a suit [against the Governor] for accounting [of expenditures from his legislative mansion allowances] petitioners [news reporters] would occupy the status of so-called 'non-Hohfeldian' plaintiffs, i.e.

persons whose interest tendered for judicial vindication is neither personal or proprietary." Oklahoma City News Broadcasters Ass'n v. Nigh, Okl., 683 P.2d 72, 78 n.2 (1984) (Opala, J., concurring in result); *see* Flast v. Cohen, *supra* note 16, 392 U.S. at 119, 88 S.Ct. at 1962 n.5 (Harlan, J., dissenting).

[35] There is a very narrow exception to the requirement for a Hohfeldian plaintiff — a taxpayer who complains of an unconstitutional tax levy. *See* Flast v. Cohen, *supra* note 16. The protestants in this abortion petition do not bring themselves within the narrow exception to the requirement for a Hohfeldian plaintiff.

[36] Section 4 of the proposed initiative measure provides:

> "Section 4. *Crime of Abortion* and Punishments
>
> (A) Except as provided in Section 5, a person commits the *crime of abortion* if:
>
> (1) Such person performs an abortion upon another person; or
>
> (2) Such person intentionally or knowingly aids or abets the performing of an abortion upon another person.
>
> (B) Every natural person guilty of the *crime of abortion* is *punishable by imprisonment* in the penitentiary for not less than four (4) years.
>
> (C) Any person, other than a natural person, guilty of the *crime of abortion* is *punishable by a fine* not less than Ten Thousand Dollars ($10,000.00) but not exceeding One Hundred Thousand Dollars ($100,000.00)." (Emphasis mine.)

[37] *See* State ex rel. Henry v. Mahler, Okl. 786 P.2d 82, 85-86 (1990); Carder v. Court of Criminal Appeals, Okl., 595 P.2d 416, 419 (1979); Anderson v. Trimble, Okl., 519 P.2d 1352, 1355 (1974); Hinkle v. Kenny, 178 Okl. 210, 62 P.2d 621, 622 (1936). *See also* Walters v. Oklahoma Ethics Com'n, Okl. 746 P.2d 172, 180 n.8 (1987) (Opala, J., concurring). The Court of Criminal Appeals is not an utter stranger to appellate judicature addressing the validity of a criminal statute dealing with abortion. *See, e.g.*, Jobe v. State, Okl.Cr., 509 P.2d 481 (1973).

[38] Oklahoma jurisprudence is based on judicial construction of Art. 7, §4, Okl.Const., as well as on similar language of its pre-1967 counterpart in Art. 7, §2, Okl.Const. The earlier version of §2 was repealed by the 1967 amendment of Article 7, Okl.Const. (State Question No. 448, Legislative Referendum No. 164, adopted at election held July 11, 1967).

The terms of Art. 7, §4, Okl.Const., provide in pertinent part:

> "The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; *except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute* and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction, and such determination shall be final...." (Emphasis mine.)

See Hinkle v. Kenny, *supra* note 37 at 622; Anderson v. Trimble, *supra*

note 37; Corley v. Adair County Court, 10 Okl.Cr. 104, 134 P. 835, 836 (1913).

[39] *See* Hinkle v. Kenny, *supra* note 37 at 622, where this court reiterated its settled policy to follow the decisions of the Court of Criminal Appeals in matters of criminal law and *the construction of criminal statutes.* The stated purpose of this policy is to avoid "a conflict of opinions and decisions between the two courts." *See also* State ex rel. Henry v. Mahler, *supra* note 37 at 85-86; State ex rel. Ikard v. Russell, 33 Okl. 141, 124 P. 1092 (1912); Ex parte Buchanan, 113 Okl. 194, 240 P. 699 (1925); Ex parte Meek, 165 Okl. 80, 25 P.2d 54 (1933). In *Ex parte Meek, supra* at 56, we said:

> "Separate courts for the trial of criminal cases are common, as are separate appellate courts to entertain appeals in cases falling within these respective divisions. The settled and reasonable policy of the law is that there should be no conflicts in their jurisdictions or in their acts or decisions, where such conflicts are avoidable. The makers of our Constitution had this policy in mind and so indicated that this was their mind by using the term 'exclusive appellate jurisdiction in criminal cases' when they prescribed the jurisdiction to be given to the Criminal Court of Appeals."

The Court of Criminal Appeals in Corley v. Adair County Court, *supra note* 38 at 836, acknowledged this doctrine, relying upon the principle that two bodies of equal density cannot occupy the same space at the same time.

[40] *Supra* note 37. In *Walters* the court abstained from deciding whether certain non-bank loans violated the Oklahoma Ethics Commission Act. Our refusal to there grant declaratory relief was rested on well-established principles of deference which must always control orderly interaction of civil remedies with criminal process.

[41] Ex parte Anderson, 33 Okl. 216, 124 P. 980, 981 (1912); Ex parte Meek, *supra* note 39; Hinkle v. Kenney, *supra* note 37; see Ex parte Barnett, 180 Okl. 208, 69 P.2d 643, 644 (1937); Corley v. Adair County Court, *supra* note 38; Hurst v. Pitman, 90 Okl. Cr. 329, 213 P.2d 877, 882 (1950).

[42] The pertinent terms of Art. 7, §6, Okl.Const., are:

> "Except with reference to the Senate sitting as a Court of Impeachment and the Court on the Judiciary, *general administrative authority over all courts in this State ... is hereby vested in the Supreme Court* and shall be exercised by the Chief Justice in accordance with its rules...." (Emphasis mine.)

[43] For the text of Art. 7, §4, Okl.Const., *see supra* note 38.

[44] *Carder, supra* note 37 at 420.

[45] United States v. Western Pacific Railroad Co., 352 U.S. 59, 63, 77 S.Ct. 161, 164, 1 L.Ed.2d 126 (1956); Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-305, 96 S.Ct. 1978, 1986-1987, 48 L.Ed.2d 643 (1976); Maislin Industries, U.S. v. Primary Steel, Inc. ___ U.S. ___, 110 S.Ct. 2759, 2762, 111 L.Ed.2d 94 (1990); Sears, Roebuck & Co. v. San Diego Cty., Etc., 436 U.S. 180, 199, 98 S.Ct. 1745, 1758, 56 L.Ed.2d 209 (1978). "'The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question

whether the court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue.'" *Sears, supra*, 436 U.S. at 199, 98 S.Ct. at 1758 n.29, quoting Professor Davis, 3 K.Davis, Administrative Law Treatise §19.01, p. 3 (1958) (emphasis in original).

[46] United States v. Western Pacific Railroad Co., *supra* note 45; Nader v. Allegheny Airlines, Inc., *supra* note 45.

[47] United States v. Western Pacific Railroad Co., *supra* note 45.

[48] Stipe v. Theus, Okl., 603 P.2d 347, 349-350 (1979).

[49] For the terms of Art. 2, §22, Okl.Const., *see supra* note 4.

[50] Rule 3.1, Rules of Professional Conduct, 5 O.S. 1991, Ch. 1, App. 3-A, provides in pertinent part:

> "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a *good faith argument for an extension, modification or reversal of existing law*...." (Emphasis added.)

The pertinent terms of 12 O.S. 1991 §2011 are:

> "***The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a *good faith argument for the extension, modification, or reversal of existing law*...." (Emphasis added.)

Federal Rule 11, Federal Rules of Civil Procedure, states in part:

> " "***The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a *good faith argument for the extension, modification, or reversal of existing law*...." (Emphasis added.)

[51] 410 U.S. 113, 163-64, 93 S.Ct. 705, 731-732, 35 L.Ed.2d 147, 182-183 (1973).

[52] *Supra* note 6.

[53] For the terms of Art. 2, §22, Okl. Const., *see supra* note 4.

Our constitution's initiative provisions not only guarantee the right to vote on a proposed measure, they also afford the people a valued opportunity to ventilate — i.e., to air issues in a free political debate. This court has a constitutionally mandated duty to uphold and safeguard free pre-election ventilation of political views. *See* In re Initiative Petition No. 314, Okl., 625 P.2d 595, 613 (1981) (Opala, J., concurring), where I observe that a measure's submission too close to an election would deprive its proponents as well as the contestants of a fundamental right to inform the public about the merits and demerits of the issue before the electorate.

[54] The terms of Art. 24, §1, Okl. Const., provide in part:

> Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature... and referred ... to the people for

their approval or rejection...."

[55] Art. 3, §5, Okl.Const., provides:

"All elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage, and electors shall, in all cases, except for treason, felony, and breach of the peace, be privileged from arrest during their attendance on elections and while going to and from the same."

[56] Art. 2, §4, Okl.Const., provides:

"No power, civil or military, *shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right.*" (Emphasis added.)

[57] The right of a qualified elector to vote and have that vote counted is basic and fundamental. McCarthy v. Slater, Okl., 553, P.2d 489, 490 (1976); Sparks v. State Election Board, Okl., 392, P.2d 711, syllabus 1 (1964). See Jackson v. Maley, Okl., 806 P.2d 610, 623-624 (1991) (Opala, C.J., dissenting).

[58] *Supra* note 6.

[59] "The only options available as a remedy *against invasive initiative power* are (a) to curb — as Justice Mosk suggests — the people's power to create chaos by constitutional amendment defining areas of regulation that lie outside the reserved power of initiative or (b) to act judicially and invalidate an actually *adopted measure when it visits crippling damage to the operations of government by causing institutional paralysis.*" In Re Initiative Petition No. 348, *supra* note 7 at 787 (Opala, C.J., concurring in result). *See* Kennedy Wholesale v. Bd. of Equalization, 806 P.2d 1360, 1367 (Cal. 1991) (Mosk, J., concurring), for Justice Mosk's observations about the limits of the electorate's power to legislate by initiative petition.

[60] *See* cases in *supra* note 7.

[61] As Justice Blackmun states in his dissenting opinion in Planned Parenthood v. Casey, *supra* note 6, ___ U.S. at ___, ___S.Ct. at ___; "All that remained between the promise of *Roe* [supra note 51] and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* [492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989)] gave little reason to hope that this flame would cast much light.... But now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this court before Webster. And *I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.*" He further observes, "In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short — *the distance is but a single vote.* I am 83 years old. I cannot remain on this Court forever, and when I do step down, *the confirmation process for my successor well may focus on the issue before*

us today. That, I regret, may be exactly where the choice between the two worlds will be made." *Id., supra,* ___ U.S. at ___, ___ S.Ct. ___. (Emphasis mine.)

JUSTICE ALMA WILSON (dissenting in part) The course taken by the majority while claiming to adhere to the federal constitution actually violates our state constitution.[1] Today's exercise of judicial power interferes with the exercise of the political power of the people, acting as our legislative branch of state government. I refuse to join in this flagrant encroachment upon the people's legislative powers.

Oklahoma's constitution requires that the powers of the three branches of our state government be separate and independent. Article IV, §1 provides:

> The powers of government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others. (Emphasis added.)

The doctrine of separation of powers was recently considered by this Court in *State ex rel. York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984). In *York*, presented with the issue of the effect of an opinion of the Attorney General [an act of the executive branch of government] declaring a statute unconstitutional, we said:

> The true import of the doctrine of separation of powers is that the whole power of one department shall not be exercised by the same hands which possess the whole power of either of the other departments; and that no one department ought to possess *directly* or *indirectly* an overruling influence over the others. *Baley v. State Board of Public Affairs,* Okl. 495, 153 P.2d 235 (1944).

Recognizing the overruling effect of the A.G.'s opinion upon the legislative branch of government, this Court quoted *Threadgill v. Cross,* 26 Okla. 403, 109 P. 558, 562 (1910):

> In the legislative department of the government is vested the power of enacting all laws. To that department is intrusted the determination of what laws shall be enacted, and what laws shall not be enacted. It must in the first instance determine whether a proposed measure is valid or invalid, and in doing so it will not be presumed that the members of that department, whether they be the electors at the polls, or the members of the Legislature, will enact or attempt to enact legislative measures that they know are violative of the state Constitution or of the federal Constitution, but that they will act from patriotic motives and endeavor to adopt such laws only as will best serve the public good, keeping in mind the limitation upon their powers fixed by the Constitution of the state and the federal Constitution as the supreme law of the land. When such department has acted upon a proposed measure and adopted same, it thereby becomes clothed with the presumption that it is a valid enactment and with its validity the executive and judicial departments have nothing to do, until it becomes the duty of these respective departments to participate in the construction or enforcement of such statute. The duty of determining what law shall be enacted and what law shall not be enacted rests neither upon the executive nor the judicial department.

York, 681 P.2d at 766.[2]

The majority opinion does not speak to the doctrine of separation of governmental powers. Notwithstanding this silence, the plain words of our state constitution forbid the use of judicial power to prevent or interfere with the legislative process invoked by the initiative petition.[3] The people created our state government for their protection, security, and benefit.[4] The people divided the powers of our state government into three separate, distinct and independent departments.[5] Legislative power is vested in the Legislature, but the people reserved to themselves the right to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature.[6] In

our state constitution, the people reserved to themselves legislative power of the highest order; laws enacted by the people through the initiative process are not subject to the constitutional veto power of the Governor, nor are the effective dates of laws enacted by the people subject to the constitutional limitations placed on enactments of the Legislature.[7] Our state constitution recognizes that all political power is inherent in the people[8] and prohibits the use of any governmental power to interfere with the people's right to the franchise.[9] With these constitutional provisions, the people withheld from this Court the political power to scrutinize the initiative petition, to assist those proposing or opposing the initiative petition, or to direct the initiative process.[10]

I agree with the majority that "(t)he issue of the constitutionality of the initiative-petition is governed by the United States Supreme Court's pronouncement in *Casey*."[11] However, the real question presently before this Court is one of fundamental state law: Will this Court wield its power to supervise the legislative process invoked by initiative petition of the people? I do not agree with the majority's conclusion that in this case "the only course available to this Court is to follow what the United States Supreme Court, the final arbiter of the United States Constitution, has decreed."[12] The only course available to this Court is to determine the validity of the count of electors signing the initiative petition and the legality of the ballot title.[13]

If the people have secured sufficient, valid signatures of the registered electorate of this state to invoke their highest order of legislative power, then the people have a constitutional right to complete their legislative process by voting on Initiative Petition No. 349, State Question No. 642.[14] Submitting the petition to the people is not the "easy course," it is the only constitutional course.

I am authorized to state that Chief Justice Opala joins in this view.

[1] This initiative petition protest proceeding does not present an issue of irreconcilable conflict between federal constitutional jurisprudence and the state constitutional provisions. Federal constitutional law does not impose a duty upon this Court to review proposed legislation for possible violations of the federal constitution.

[2] The majority opinion does not modify *Threadgill* as an erroneous or obsolete interpretation of the separation of powers doctrine.

[3] The ultimate responsibility for construction and interpretation of our law is with this Court. *Monson v. State ex rel. Oklahoma Corporation Commission*, 673 P.2d 839 (Okla. 1983) and *York v. Turpen*, 681 P.2d at p.767. And, when asked to construe a provision of our state constitution, the facially apparent meaning must be accepted by the Court, *Shaw v. Grumbine*, 137 Okla. 95, 278 P. 311 (Okla. 1929).

[4] Okla. Const., art. II, §1 provides:

> All political power is inherent in the people, and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided such change shall not be repugnant to the Constitution of the United States. (Emphasis added.)

[5] Okla. Const., art, IV, §1.

[6] Okla. Const., art V. §1 provides:

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives, but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature. (Emphasis added.)

[7] Okla. Const., art. V, §3 provides in part:

> The veto power of the Governor shall not extend to measures voted on by the people.... Any measure referred to the people shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.... Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of the State and addressed to the Governor of the state, who shall submit the same to the people. The Legislature shall make suitable provisions for carrying into effect the provisions of this article.

[8] Okla. Const., art. II, §1.

[9] Okla. Const., art. II, §4 provides:

> No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right.

[10] *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795, ___ U.S. ___, (June 29, 1992) went to the United States Supreme Court on a record made in several days of trial to the bench. Although complaining abortion clinicians challenged the facial validity of Pennsylvania law, the Supreme

Court grounded its holdings in the evidentiary record presented. The pronounced "undue burden without due process of law" [14th Amendment violation] was expressly supported by the evidentiary record.

I refuse to speculate regarding the evidence that might be presented were the proposed measure in Initiative Petition No. 349, State Question No. 642 enacted into law and challenged in our courts.

" Opinion, p.8.

If enacted, the statutes proposed by the Initiative Petition No. 349, State Question No. 642 explicitly provide for interpretation and construction consistent with federal decisional law. The first two sections of the proposed measure state:

Section 1. Statement of Intent

It is the intention of the People of the State of Oklahoma to grant the right to life to all unborn humans and to restrict abortion to the full extent permitted by the Constitution of the United States, the decisions of the United States Supreme Court, and federal statutes.

Section 2. Findings and Principles of State Law

(A) The people of the State of Oklahoma find by popular vote that:

(1) They desire to balance the rights of a pregnant female with the rights of her unborn child;

(2) The State of Oklahoma has a compelling interest in the sanctity of unborn human life;

(3) Childbirth is favored over abortion;

(4) Great harm is caused by unrestricted abortion;

(5) The terms pregnancy "trimesters" and "viability" of unborn children are not found in the text of the United States Constitution:

(6) The State of Oklahoma's compelling interest in protecting unborn human life does not come into existence only at the point of viability, and there is no rigid line distinguishing Oklahoma's right to restrict abortion either before or after viability;

(7) The life of each human begins at fertilization;

(8) The presence of a fertilized ovum in a female's body is the point at which Oklahoma's compelling interest in protecting unborn human life comes into existence;

(9) Unborn children have protectable interests in life, health, and well-being; and

(10) The abortion issue should be resolved by a vote of the People of the State of Oklahoma.

(B) From the effective date of this Act, the laws of the state of Oklahoma should be interpreted and construed to acknowledge on behalf of an unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this State, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court. (Emphasis added.)

Perusal of these two sections, in light of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, indicates a likelihood that paragraphs numbered 6 and 8 of Section 2 would be stricken as unduly restrictive of a woman's constitutionally protected liberty interests. The majority opinion does not deal with the provisions set out above. Rather, the majority finds the provisions of the proposed measure which define crimes and impose criminal penalties to be contrary to *Casey*.

[12] Opinion, p.8.

The majority's conclusion is supported by erroneous and sensational legal findings that: 1) the unconstitutionality of the initiative petition is manifest; 2) Oklahoma women who do not fall within four narrowly defined categories would be absolutely prohibited from exercising the pre-viability liberty interest expressly recognized by *Casey;* 3) "Initiative Petition No. 349 *criminalizes* and *absolutely prohibits* abortions except in four narrow circumstances..."; and, 4) "Our limited role, like the role of all state courts in such cases, is to apply federal constitutional law, not to make it nor to guess what it may become."

[13] The protest to the count of electors signing the initiative petition and the ballot title is before this Court pursuant to the special statutory proceedings established in 34 O.S. 1992, §§1, et seq. This statutory proceeding does not invoke the extraordinary powers of this Court to do what is fair and just.

[14] Relying on popular information, but without a single allegation nor any evidence, this Court determines that resolution of the constitutionality of the proposed measure will prevent a "costly" election. Assured of the upcoming general election in November, I doubt that printing of this state question on the November ballot would create any appreciable cost to the taxpayers of this state. The cost of government simply does not warrant judicial interference with the legislative process.

Further, it is the unique duty of judiciary to preserve our constitution and, when a legislative enactment conflicts with its provisions, to declare the statute unconstitutional. See: *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978) (declared 68 O.S. Supp. 1977, §1402a unconstitutional as a violation of the Commerce Clause of the United States Constitution because the statute placed an additional two percent use tax on tangible personal property purchased outside Oklahoma); *Woods Development Co. v. Meurer Abstract*, 712 P.2d 30 (Okla. 1985) (declared 1 O.S. 1981, §7 [repealed 1984] unconstitutional because it set a mandatory fee schedule for abstractors and was vague, economically unreasonable and confiscatory thereby violating economic due process); *Board of Trustees of Police Pension v. Weed*, 719 P.2d 1276 (Okla. 1986) (declared 11 O.S. 1971, §541p and Oklahoma City Code §2-342 [1970] unconstitutional because they required forfeiture of a retired police officer's pension benefits when the officer was convicted of a felony and thereby violated Okla. Const. art 2, §15, which prohibited forfeitures of estates upon conviction of a crime); and, *Reynolds v. Porter*, 760 P.2d 816

(Okla. 1988) (declared 76 O.S. 1981, §18 unconstitutional because the statute, which gave a three year limitation on certain damages in malpractice cases, violated Art. 5, §§6 and 59 of the Oklahoma Constitution). See also, *Jobe v. State*, 509 P.2d 481 (Okla. Crim. App. 1973) (declared the Oklahoma anti-abortion statute, 21 O.S. 1971, §861, unconstitutional because it failed to recognize the pregnancy stage of the mother and other interests involved thereby violating the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, citing *Roe v. Wade*, 410 U.S. 113 [1973]).

Allowing the legislative branch of government, whether acting through the Legislature or the populace, the presumption that it seeks to adopt such laws only as will best serve the public good, keeping in mind the limitation upon their powers fixed by the Constitution of the state and the federal Constitution as the supreme law of the land, prevents unwarranted judicial encroachment upon the power of the legislative branch of government.

SIMMS, J., (concurring) I concur fully in the majority opinion authored by Justice Kauger, and I join those views expressed in the writing of Justice Lavender, but write briefly to address the dissenting views of the Chief Justice, Vice Chief Justice, and my colleague Justice Wilson.

The writing of both the Chief Justice and the Vice Chief Justice refer to Mr. Justice Blackmun's age and a potential or impending change in personalities on the Supreme Court of the United States. This approach, in my view, ignores the foundation of a stable and orderly system of justice as we know it in this country, *stare decisis*. By basing a conclusion which might or might not occur in the future to personalities on the high court, they stray from the steady course our ship of state has sailed for over two hundred years, that ours is a government of laws and not of men. We should not be a slave of *stare decisis* nor should we, as judicial officers, ignore *stare decisis* when the Supreme Court of the United States has spoken.

I also must respectfully disagree with the Chief Justice that this matter should be transferred to the Court of Criminal Appeals. The review of initiative petitions is vested both by Constitution and statutes in the Supreme Court. Title 34, O.S. 1991, §8; *In re Initiative Petition No. 314*, 625 P.2d 595, 607

(Okla. 1981). There is no provision under Oklahoma law which authorizes review of initiative petitions by the Court of Criminal Appeals, which is one of limited jurisdiction. Such a transfer of this case at this stage of the proceedings is unprecedented in Oklahoma. We do not herein consider the appeal of a conviction or reserved question of law under a criminal prosecution, nor is this matter incidental to an appeal in a criminal case. The initiative petition to consider liquor by the drink, pari-mutuel betting, and an ethics commission each contained criminal penalties, but no one remotely considered transferring those cases to the Court of Criminal Appeals.

We are herein addressing a complex but yet very simple issue, i.e., whether or not this initiative petition comports with Federal constitutional law, and the law of the State of Oklahoma. The citizens of this state have reserved unto themselves by enactment of our constitution, the right to effect statutory or constitutional change through the initiative process. Art 5, §1, Okla. Const. However, the people have imposed upon themselves a restriction by approving Art. 2, §1, Okla. Const., which reads "...Provided such change shall not be repugnant to the Constitution of the United States." This is the issue which this Court is duty bound to review, and not the Court of Criminal Appeals.

I am authorized to state that Justice Lavender, Justice Kauger, and Justice Watt join with me in the views expressed in this concurring opinion.

HODGES, VCJ., (concurring in part, dissenting in part, with whom HARGRAVE, J., joins) I dissented in this Court's decision to *sua sponte* direct the parties to brief the impact of *Planned Parenthood v. Casey,* 60 U.S.L.W. 4795 (U.S. June 29, 1992), on the initiative petition. The issue of the constitutionality of the measure proposed by the initiative petition was not initially briefed by the parties. In fact, protestants withdrew their constitutional claims. Thus, the issue is not properly before the Court and should not be the determining factor in denying the people their right to vote.

The people have a constitutional right to vent their anger

and frustration through the initiative process in an effort to effect change in their government. The proponents are correct that central core political issues such as abortion should be submitted to a vote of the people when presented by an initiative petition.

It appears that all parties in this case want the initiative petition submitted to a vote of the people only to be thwarted by this Court's *sua sponte* injection of the constitutional issues. A healing between competing sides of the abortion question may never be reached but perhaps, if allowed, a vote of the people could be a beginning.

Casey presents a United States Supreme Court bitterly fragmented over the continuing viability of *Roe v. Wade*. *Casey* may or may not remain the law of the land.[1] Therefore, for all of the above reasons, I personally feel that it would be judicious to address the constitutionality of the measure after such time it may be approved by a vote of the people. But due to the rejection of this approach by my colleagues in a divided vote, I will address the Constitutional issue before this Court.

I agree that the measure proposed by the initiative petition is unconstitutional. It draws no distinction between restrictions on the abortion of a viable fetus and a fetus in the initial stages of development as required by the United States Supreme Court in the cases of *Roe* and *Casey*. Proponents admit the proposed measure is unconstitutional and was intentionally drawn so it could be presented to the United States Supreme Court as a test case to overrule *Roe v. Wade*. If so, then this option is still open for them as a certiorari appeal to the United States Supreme Court.

Today's refusal by this Court to allow a vote on the initiative petition based on its unconstitutionality could be reviewed according to the United States Supreme Court's Rule 10. Section 1(c) of that rule provides that a petition for certiorari review will be considered "when a state court...has decided an important question of federal law which has not been, but should be settled by [the United States Supreme Court], or has decided a federal question in a way that con-

flicts with applicable decisions of [that] court." If, as proponents claim, the United States Supreme Court should be the court to examine the constitutionality of the measure, that Court may choose to do so by granting certiorari review of our decision today.

[1] Justice Blackmun made the following observation in *Casey:*

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the [abortion] issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Id. at 4826 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

LAVENDER, J., (concurring specially) Once a determination is made the proposed statutory scheme involved here is patently unconstitutional as violative of the United States Constitution as interpreted by the United States Supreme Court, the only further question we must decide is whether the people of Oklahoma have a right under either the Oklahoma Constitution or the First Amendment to the United States Constitution to vote on the enactment of a law which is violative of the fundamental law of our country. I do not believe the people have such a right under either the State or Federal Constitutions. What must be remembered here is that the right of initiative inuring in the people is a creature of our State Constitution and the State of Oklahoma, like the people which are its citizens, are a part of a larger whole, the United States of America. As such the State of Oklahoma and her citizens are subject to the supreme law of this country, the Constitution of the United States and the final arbiter of that document is the United States Supreme Court. This recognition has guided us well through most of our history as a nation and I believe it will continue to guide us well in the future. In essence, the recognition is that our country was founded upon and is guided by the rule of law. In that this Court is bound by the decisions of the United States Supreme Court in matters of federal constitutional interpretation and if the proposed enactment were voted into law we would be duty bound to strike down its central and primary provisions as

violative of the United States Constitution in any post-election facial challenge, I concur in the Court's opinion invalidating the initiative petition before us and ordering the proposed question stricken from the ballot. Our determination to do so is not a new or novel one. *See In Re Initiative Petition No. 344*, 797 P.2d 326 (Okl. 1990); *In Re Initiative Petition No. 342*, 797 P.2d 331 (Okla. 1990); *In Re Initiative Petition No. 314*, 625 P.2d 595 (Okla. 1980) (all invalidated initiative petitions as violative of the one subject rule under State law). Although I dissented in each of these cases on the ground the proposed measures involved there did not violate the one subject rule, I did not question, as a majority of this Court did not, the authority of this Court to invalidate an initiative petition sought to be submitted to the people based on a constitutional infirmity.

Furthermore, we have squarely held a decision on a constitutional question as to the legality of a measure proposed to be enacted into law through the initiative process may be reached by this Court at the pre-election stage. *In Re Initiative Petition No. 348*, 820 P.2d 772, 780 (Okla. 1991) (whether proposed revenue raising provisions violate federal republican form of government guarantee); *In Re Initiative Petition No. 341*, 796 P.2d 267, 269 (Okla. 1990) (constitutional challenges under First Amendment to the United States Constitution and OKLA. CONST. art IV, §1, separation of powers); *In Re Initiative Petition No. 315*, 649 P.2d 545, 547-548 (Okla. 1982) (State constitutional challenges to initiative petition concerning horse racing). Although reasonable people may disagree as to whether we should exercise our authority to review facial constitutional challenges at the preelection stage it is my view there is no inherent infirmity in our doing so. While it may be easier for us to simply decline to review the facial challenge now because we may then never be faced with having to decide the constitutionality of the proposed statutory scheme either because it may, in fact, not be enacted into law by the voters or, if it is, any post-election challenges may be brought in federal court rather than in the State court system, our responsibility as judges is

not simply to take the easiest course. Accordingly, because we have the authority to decide the type of constitutional question presently before us and the proposed legislation sought to be enacted into law by the involved initiative petition is facially unconstitutional in violation of the United States Constitution I concur in the majority opinion to invalidate the initiative petition and to strike it from the ballot.

I am authorized to state Simms, Kauger and Summers, JJ., join in the views expressed herein.

ORDER CORRECTING OPINION

The opinion by Opala, C.J., promulgated herein August 4, 1992, is hereby corrected as follows:

1. By adding a sentence at page 1 in the last line of the text between the words "speech.[4]" and "Judges":

> The Basic Charter of this Nation's government, on which our legal order is rested, must not be misperceived as an infallible and hence unmentionable holy icon.

In all other respects the opinion by Opala, C.J., shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THIS 5TH DAY OF AUGUST, 1992.

/s/ Marian P. Opala
CHIEF JUSTICE

IN RE: INITIATIVE PETITION NO. 349, STATE QUESTION NO. 642

No. 76,437. August 18, 1992

ORDER CORRECTING OPINION

The opinion by Opala, C.J., promulgated herein August 4, 1992, is hereby corrected by adding the following as a new paragraph at the end of footnote 8 at page 4:

Threadgill continues to meet with approbation of the

Nation's legal community. See the tentative report of the TIPS Task Force on Initiatives and Referenda (Tort and Insurance Practice Section of the American Bar Association), submitted August 11, 1992, where under subsection "B. Judicial Review of Proposal and Ballot Title" at page 14 the Task Force recommends that "[c]hallenges to the substance of the initiative on general state or federal constitutional grounds should be permitted *only after the election on the initiative at issue*" (emphasis added) and then comments at page 17:

> "*Judicial review should not be available at this stage, however, for challenges on the basis of general state or federal constitutional issues, for instance, a challenge that the proposal, if enacted, would deny certain persons due process of law. These challenges, which may affect the desirability of the proposal, but are not directed to the specific qualifications for a ballot issue, may more appropriately be brought when and if the electorate enacts the proposal.* While early determination of these issues may result in certain economies of judicial time if joined with other challenges, and would avoid the expenditure of funds for the election process on a proposition that is ultimately invalidated, the Task Force believed that these considerations were outweighed by a desire to avoid delay in the initiative campaign. Limiting litigation on these issues to post-election challenges is also consistent with the general principle that constitutional questions are to be avoided unless it is necessary to resolve them. Even where confronting constitutional issues seems inevitable, these questions should not usually be determined under conditions that permit only a limited time for reflection." (Emphasis mine.)

In all other respects the opinion by Opala, C.J., shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THIS 18TH DAY OF AUGUST, 1992.

/s/ Marian P. Opala
CHIEF JUSTICE

SUPREME COURT NO. 76,437

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 24 1992
JAMES W. PATTERSON
CLERK

IN RE:
INITIATIVE PETITION NO. 349
STATE QUESTION NO. 642

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ABORTION, INC. AND
FRED W. SELLERS, JR.

INITIATIVE PETITION ORIGINAL PROCEEDING

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**Case No. 76,437**
	)	
STATE QUESTION NO. 642	)	

PROPONENTS' BRIEF

COME NOW the Proponents and submit the following Brief pursuant to the Court's briefing Order of July 14, 1992.

PRELIMINARY STATEMENT

S.Q. 642: THE TEST CASE FOR CHANGE

TEST CASE

State Question 642 was intended to effect change. State Question 642 was intended to be, remains now, and shall be, if passed, a test case.[1]

ROE v. WADE

In 1973, *Roe v. Wade*, 410 U.S. 113 (1973) ["*Roe*"] became the law of the land. In 1990, State Question 642 was written by Proponents, who knew it was contrary to *Roe*. In June, 1992 *Roe* was affirmed by the United States Supreme Court in *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795 (U.S. June 29, 1992), ___ U.S. ___ (1992) ["*Casey*"]. *Roe* continues to be the law of the land; therefore, if this Court did not review State Question 642's constitutionality under *Roe*, it should not do so under *Casey*.

[1] Contrary to what the Attorney General stated on July 17, 1992, an attorney's good faith duty concerning meritorious claims and contentions includes test cases. The Comment to Rule 3.1 of the Rules of Professional Conduct, 5 O.S. 1991, Ch. 1., App. 3-A, provides in pertinent part:

> Accordingly, in determining the proper scope of advocacy, account must be taken of the **law's** ambiguities and **potential for change.** (Emphasis added.)

INTRODUCTION

There is a fundamental right involved in this case, but it is not the one created in *Roe*. This Court's review of State Question 642's constitutionality is itself unconstitutional.

Nevertheless, this Court queries *Casey's* impact upon State Question 642, even though the statute adjudicated in *Casey* was not remotely similar to State Question 642.

Furthermore, State Question 642 is unique among abortion statutes in the Nation, because it is the only one to be voted on by the People. A law enacted through an initiative of the People is the product of pure democracy, unsullied by the political gamesmanship of the legislature.

Finally, this Court is without any jurisdictional vehicle to consider the constitutionality of State Question 642, because: (1) the Protestants withdrew their constitutional challenges, and (2) this Court entered an Order dismissing Protestants' challenge to the ballot title and striking their briefs.

Based on the arguments and authorities presented, *infra*, this Court should stay its course and certify State Question 642 for an election by the People of Oklahoma. The Oklahoma Supreme Court must not contribute to this Nation's anguish, "by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, [and] by continuing the imposition of a rigid national rule instead of allowing for regional differences." *Casey*, 60 U.S.L.W. at 4842 (Scalia, J., dissent).

ARGUMENT

I
FIRST PROPOSITION
"Core Political Speech" Versus *Norman*
A. Fundamental Right and the Initiative Process

EXPRESS FUNDAMENTAL RIGHT

Four years ago, the United States Supreme Court decided

Meyer v. Grant, 486 U.S. 414 (1988), which involved Colorado's initiative petition procedure. Colorado, like Oklahoma, is one of the 24 states that has created an initiative petition procedure. In *Meyer*, the United States Supreme Court held that a state need not implement initiative procedures. However, if the state has established an initiative petition procedure, the state may not chill core political speech by impeding the initiative petition process. The Court stated at 486 U.S. 420:

> Finally, the [Tenth Circuit] Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative procedure, it could impose this condition on its use. Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because unlike [*Posadas* (citation omitted)] which involved only commercial speech, this case involves "core political speech."
>
> * * *
>
> As we explained in *Thornhill* [citation omitted] "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the **fundamental** personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

(Emphasis added.) The Supreme Court continued at 486 U.S. 424-425:

> Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced.
>
> * * *
>
> Thus it does not support the proposition that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions.

The Court held that the impediment imposed upon the initiative petition procedure constituted an impermissible limitation of political expression and thus violated the First and Fourteenth Amendments of the United States Constitution. The Supreme Court stated at 486 U.S. 421:

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." [Citations omitted.] Appellees seek by petition to **achieve political change** in Colorado; their right freely to engage in discussions concerning the need for that **change** is guarded by the First Amendment.

(Emphasis added.)

CORE POLITICAL SPEECH

The Court made clear that an initiative petition seeking to achieve political change is core political speech. The essense of the initiative petition process is change. It is the People's vehicle for expressing their will and achieving change according to the rule of law. State Question 642 was designed as a test case for change, and as such, represents core political speech. The First and Fourteenth Amendments of the United States Constitution protect core political speech. Core political speech can occur through various media including casting votes on State Question 642.[2] This Court should not still the voice of the People expressed through the medium of their ballots[3] on an issue about which there has been "sustained and widespread debate." *Casey* at 60 U.S.L.W. 4803.

B. Oklahoma Constitutional Considerations

PEOPLE AS LEGISLATORS

The Oklahoma Constitution, Article V, §1 states:

> [T]he people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature....

[2] Not everyone will vote "Yes" on State Question 642. Voters may vote "No" and thereby express that they do not want change. The issue is freedom of expression — yes or no — about change.

[3] On February 21, 1992, Tulsa's KTUL TV, Channel 8, conducted a telepoll in which 91% indicated that they wanted to vote on State Question 642.

Therefore, judicial denial at this time of the People's right to effect change constitutes an infringement on the separation of the branches of government expressly provided for in Article IV, §1 of the Oklahoma Constitution:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and **neither shall exercise the powers properly belonging to either of the others.**

(Emphasis added.) This Court "does not 'pluck' bills moving through the legislative process for a microscopic review of their constitutional orthodoxy. Neither should the judiciary be allowed to arrest People-initiated measures by probing into their potential conformity to the constitution's norm *after* they become enforceable as law. The People *qua* lawmakers must be placed as nearly as possible in the very same position as that occupied by the leglislature." *In re Initiative Petition No. 347, State Question No. 639*, 813 P.2d 1019, 1040 (Okl. 1991) (Opala concurrence) (emphasis in original). The People of Oklahoma constitute an integral part of the legislative branch of government. The separate functions of government may not be integrated. Any attempt by this Court to infringe upon the legislative powers of the People is misplaced and constitutes a violation of the express powers granted by the Oklahoma Constitution.

ANY LEGISLATIVE MEASURE

This Court is precluded by the Oklahoma Constitution from suppesssing an initiative petition on the basis of its subject. Article 5 §2 of the Oklahoma Constitution allows:

> The first power reserved by the people is the initiative, and either per centum of the legal voters shall have the right to propose **any** legislative measure....

(Emphasis added.) The word "any" is broad. It means "of whatever kind" or "every" or "without restriction." *Webster's New Collegiate Dictionary 93* (9th ed. 1983).

C. The *Norman* Decision

BEGINNING WITH *THREADGILL*

For sixty-five years, the Oklahoma Supreme Court refrained from the premature, substantive review of initiative petitions. This line of cases originated with *Threadgill v. Cross*, 109 P. 558 (Okl. 1910), wherein an initiative petition was brought by the People in order to repeal prohibition. The Secretary of State would not file the initiative petition because he thought it violated an act of Congress. The Court stated at page 559:

> Courts do not lightly declare invalid legislative enactments made by the people or by their authorized representatives. An act of the legislative department of the government is clothed with the presumption that it is valid, and **its constitutionality will not be considered and determined by the courts as a hypothetical question.**

(Emphasis added.) This line of reasoning was also followed in *Cress v. Estes*, 142 P. 411, 412 (Okl. 1914), wherein the Court stated:

> [T]he courts are without power to say what law shall or shall not be enacted.

In *Brown v. State Election Board*, 369 P.2d 140, 142-143 (Okl. 1962), the Oklahoma Supreme Court stated:

> A state court should not forecast or anticipate the decision that may ultimately be rendered by the United States Supreme Court on an essentially federal question.

THE RADICAL DEPARTURE

In 1975, the Oklahoma Supreme Court made a radical departure from the well-established and well-reasoned principle of *Threadgill* and its progeny. In the case of *In Re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okl. 1975), ("*Norman*"), the Supreme Court asserted the authority to determine the constitutionality of initiative petitions prior to a vote of the People:

> It [the Oklahoma Supreme Court] may consider the constitutionality of matters to be considered under the initiative and referendum process as to procedure form and subject matter, **when raised**, and if in this court's opinion such a determination could prevent a costly and unnecessary election.

(Emphasis added.)[4] The Court based this statement upon 34 O.S. 1973, §8 which reads:

> After such hearing the Supreme Court of the state shall decide whether such petition be in **form** as required by the statutes.

(Emphasis added.) Nowhere in 34 O.S. §8 is there a delegation of authority to this Court to decide the content of initiative petitions prior to a vote of the People. Not only does *Norman* transcend the express language of 34 O.S. §8, it contradicts explicit provisions of the Oklahoma Constitution.

NORMAN LABYRINTH

The constitutional screening process created in *Norman* can prevent new concepts and new laws from ever being tried and tested. Initiative petition statutes are in place in order to allow the citizens to effect change. However, through the exercise of pre-election constitutional review, the body of law in Oklahoma may become trapped in an intellectual labyrinth from which only the Oklahoma Supreme Court holds the means of escape. The ability to bring forth test cases is at risk in Oklahoma under the *Norman* procedure.

PREMATURE REVIEW

Pre-election constitutional review is not authorized in Title 34 and is prohibited by the Oklahoma Constitution, prior case law, public policy, and the United States Supreme Court's core political speech doctrine. *Norman's* viability is at an end. This Court should return to the well-reasoned line of case law

[4] Although a Constitutional protest was originally filed herein, it was withdrawn on March 23, 1992. *See also:* this Court's Order of April 13, 1992.

prior to *Norman* and refrain from a premature review of State Question 642.

II
SECOND PROPOSITION
Casey Not Eternal

CASEY DICTA

In his dissent (in which Chief Justice Opala and Justice Hargrave joined), Vice Chief Justice Hodges said that "an opinion approving the initiative petition for submission to a vote of the People had been prepared and considered by this Court and was in the process of being readied for publication prior to *Casey's* pronouncement." *Casey* should not alter this Court's course of action. *Casey* did not involve a statute similar to State Question 642. In *Casey*, the issues were: (a) the breadth of the medical emergency definition; (b) whether a woman seeking an abortion must be provided with certain information in order to give an informed consent; (c) whether a married woman must sign a statement indicating that she has notified her husband; (d) whether the state may require the informed consent of one parent for a minor to obtain an abortion; and (e) whether facilities providing abortion services must comply with certain reporting requirements. State Question 642[5] would permit the choice of abortion in situations in which the interest of the mother outweighs the state's interest in protecting the unborn child: (1) grave harm to the mother's physical or mental health; (2) rape; (3) incest; or (4) grave physical or mental birth defects in the unborn child. This type of statute was not at issue in *Casey*, and any reference by the *Casey* plurality to such a statute is not binding or precedential.

SPECULATION

The pundits and prognosticators should have learned their lessons from *Casey's* surprises (particularly Justice Kennedy's vacillation). Nevertheless, "experts" are already hard at

[5] An annotated version of State Question 642, citing its origins, including language from post-*Roe* Supreme Court Opinions, was annexed to Proponents' Brief filed with this Court on April 13, 1992.

work speculating as to Supreme Court's future holdings on statutes such as State Question 642. Such speculation is as risky as building a house of cards on shifting sand. If the Oklahoma Supreme Court was prepared to certify State Question 642 before *Casey*, the Court's resolve should not be shaken by mere speculation regarding a case that is not on point.

HOLDING VERSUS PLURALITY

Although *Casey* has been characterized as a five to four decision, there is no agreement about what *Casey* means even among the five justices subscribing the joint opinion. The O'Connor/Kennedy/Souter group and the Blackmun/Stevens group disagree with regard to the compelling interest point. The undue burden test set forth in Part IV of *Casey* is a plurality decision by the O'Connor/Kennedy/Souter group. The Blackmun/Stevens group did not join in the undue burden test of *Casey*, Part IV. An opinion by three of nine justices does not constitute a holding. In the case of Justice Kennedy, his position in *Casey* is not consistent with his position in *Webster v. Reproductive Health Serv.*, 492, U.S. 490 (1989), and cannot be reconciled. Furthermore, Justices Rehnquist, White, Scalia and Thomas would overrule *Roe*.

WHAT IS A SUBSTANTIAL OBSTACLE

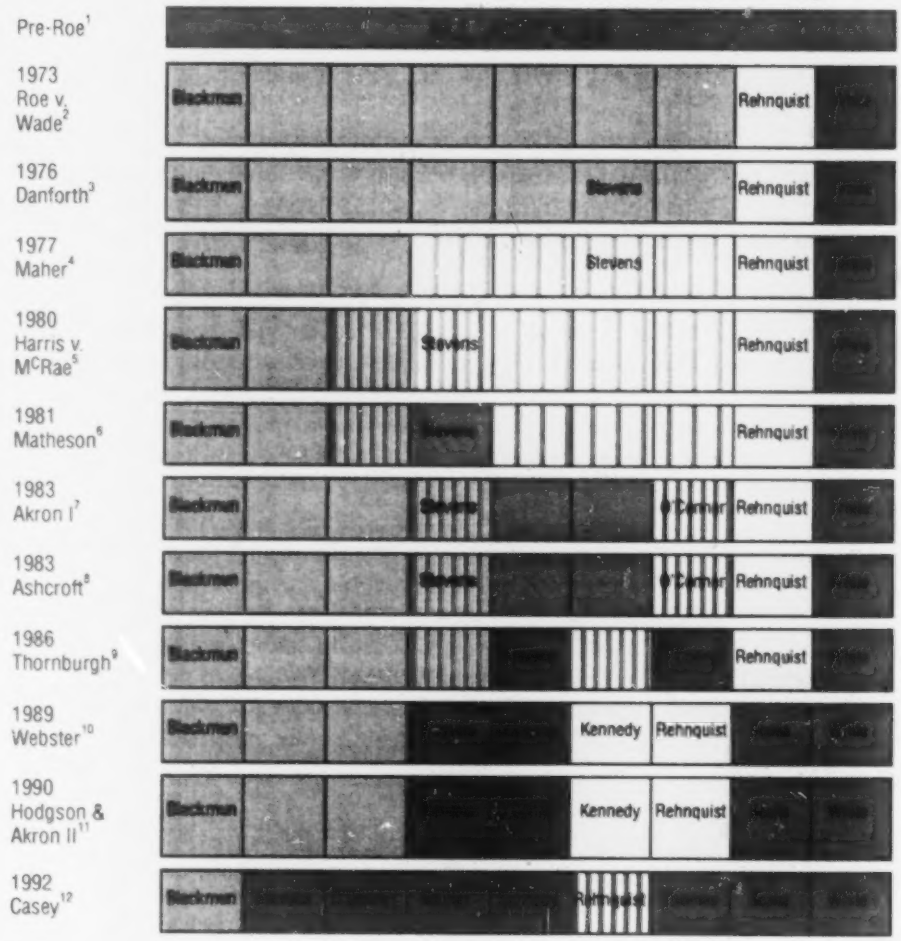
The "substantial obstacle" test is a standard which has not been fully developed through a case-by-case analysis. The "substantial obstacle" test is presently an unknown. Although we are not told what a "substantial obstacle" is, we are told by Justice Scalia what it is not. Justice Scalia says in footnote 7 to his dissent, 60 U.S.L.W. 4841, that a "substantial obstacle" is *NOT* a non-*de minimis* obstacle. Does this statement provide clarification for anyone? To further confuse the matter, Justices Blackmun and Stevens concurred with the "substantial obstacle" test but refused to adopt the Plurality's "undue burden" test; therefore, a "substantial obstacle" must not be the same thing as an "undue burden." We will not know what "substantial obstacle" means until test cases (like State Question 642) generate future opinions

by the United States Supreme Court.

NUMEROUS AND KALEIDOSCOPIC TESTS

Furthermore, the "substantial obstacle" test, whatever it is, may not be the test employed in future opinions by a Court which is presently divided three/two to four. The tests employed by the United States Supreme Court to evalute state abortion statutes have been numerous and kaleidoscopic since the 1973 pronouncement of *Roe*. In fact, change is the norm; the following table illustrates this point.

Abortion and Regulation, A Case by Case Analysis



LEGEND

	Strict Scrutiny
	Heightened Scrutiny
	Balanced Reason

	Undue Burden
	Rational Basis
	State Political Process

Footnotes to Case-by-Case Analysis

1. *See, United States v. Vuitch*, 402 U.S. 62 (1971).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

   The fundamental right of abortion was guaranteed. States were required to show a compelling interest and survive strict scrutiny when regulating. Justice Douglas disagreed with the trimester analysis.

3. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

   A physician may determine the point of viability; spousal consent was unconstitutional; parental consent was unconstitutional; recordkeeping constitutional so long as confidentiality is maintained.

4. *Maher v. Roe*, 432 U.S. 464 (1977).

   Based on a rational basis review of indigent classification, states participating in Medicaid were not required to fund non-therapeutic abortions. The regulation was upheld as rationally furthering the states legitimate interest in normal childbirth.

   The dissent of Justices Brennan, Blackmun and Marshall stated that the lack of funding to indigents "unduly burdens" the fundamental right to abortion for the indigent woman, and pointed out that strict scrutiny was not satisfied.

5. *Harris v. McRae*, 448 U.S. 297 (1980).

   Due process did not require funding for abortions under Medicaid except: (1) where the female life was endangered if the fetus was carried to term, (2) rape, or (3) incest. Participating states were not required to fund abortions where federal reimbursement was unavailable. While Justice White concurred with the majority, he pointed out that he would not abandon *Maher* and extend *Roe* to forbid the legislative policy expressed in the Hyde Amendment. (448 U.S. at 328).

6. *H.L. v. Matheson*, 450 U.S. 398 (1981).

   A physician was required, if possible, to notify the parents of an unemancipated child seeking an abortion. The majority pointed out that there was a significant state interest in protecting the minor child. Concurring Justices said that this regulation does not unconstitutionally burden the minor's right to abortion. The dissent pointed out that parental notice "facially infringes upon the minor female's right to privacy and decision to complete or terminate her pregnancy." (This case represents a continued departure from the strict scrutiny standard.)

7. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

A state requirement that all second trimester abortions be performed in a hospital was held unconstitutional; state determination of information that a physician must convey to obtain an informed consent was held unconstitutional; 24 hour waiting period after the woman signed the consent was held unconstitutional. While strict scrutiny may be arguably implicit, the focus of the Court was on the legitimacy of the state interest involved. In addition, several members of the Court employed heightened scrutiny, and Justice O'Connor first mentioned the undue burden standard of review. (Individual Justices appeared to utilize the standard that best fit their objectives.)

8. *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

Parental consent which facially appaars to create a veto for an immature unemancipated female seeking abortion was held constitutional; a pathology report requirement was held constitutional; the "relatively insignificant burden" standard was employed. Justice O'Connor concurred, but reiterated the undue burden standard. The second physician requirement during all abortions where fetus was viable was held constitutional.

9. *Thornburgh v. American College of Obstetritians and Gynecologists*, 476 U.S. 747 (1986)

A second physician requirement for all abortions performed after the fetus was viable was held unconstitutional; public record reporting requirement was unconstitutional. In her dissent, Justice O'Connor accused the Court of ad hoc decision making where abortion regulation was involved. She reemphasized her undue burden standard.

10. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

The plurality expressed the view that there was a compelling state interest prior to viability. Stare decisis was respected; however, the plurality indicated that the Court can make needed changes.

11. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 501 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

The Court held that the parental consent provision, without a judicial bypass, was unconstitutional, but the same provision with a bypass was constitutional.

12. *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795 (U.S. June 29, 1992).

The *Roe* trimester framework was rejected and the state may promote its interests throughout pregnancy. The undue burden standard was employed.

State-imposed factors for informed consent were constitutional so long as they are truthful and non-misleading. Required information about abortion procedure, attendant health risks, the risks of childbirth, and the probable gestational age of the fetus were also permissible; a 24-hour waiting period after informed consent and before the abortion was constitutional. Parental consent with judicial bypass was constitutional; spousal notification, however, was unconstitutional.

CHANGE

The only thing that can be said with certainty with regard to the tests employed by the United States Supreme Court to evaluate state abortion statutes is: there is nothing permanent except change.

NOT THE FINAL WORD

Surely no one would seriously contend, with any degree of intellectual honesty, that *Casey* is the final word from the United States Supreme Court on abortion. As Justice Scalia states in his *Casey* dissent at 60 U.S.L.W. 4842:

> There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court.
>
> * * *
>
> Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

GUESSING ABOUT CONSTITUTIONALITY

State Question 642 is a measure which balances the rights of women with the rights of unborn children. Is State Question 642 unconstitutional under *Roe* and its progeny, including *Casey*? Protestants will argue, no doubt, (as did the Attorney General in the July 17, 1992, Brief) that State question 642 is unconstitutional under the *present* decisions of the United States Supreme Court. But, State Question 642 is not *presently* before the United States Supreme Court. Will the United States Supreme Court declare State Question 642 constitutional or unconstitutional two or three years from now. As to that question, the Attorney General and Protestants are guessing. No one except the United States Supreme Court (as constituted two or three years from now) can conclusively and authoritatively answer that question.

EVOLVING CONSTITUTION

There is no eternal benchmark in constitutional law concerning abortion. The United States has a living Constitution, which is constantly evolving. The passage of new statutes and the test cases they generate are essential to the evolution of the law, including constitutional law. State Question 642 is precisely the type of statute which the United States Supreme Court in *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989), invited the States to bring to the High Court.[6]

III
THIRD PROPOSITION
The Legitimacy of a Law Passed by the People

JUDICIAL DEFERENCE

Laws passed by a legislature only approximate the will of the People. Laws passed by the People directly reflect the will of the People. Laws passed by the People should be shown judicial deference not afforded the enactments of legislatures.

STARE DECISIS

The doctrine of *stare decisis* provides that once a court has established a principle of law applicable to certain facts, it will adhere to that principle where the facts are substantially the same. *Evans v. Victor*, 204 F. 361, 367 (8th Cir. 1913) (*on appeal from* E.D. Okl.). The Pennsylvania statute at issue in *Casey* is different from State Question 642 in many ways, but it is critically distinguishable in a unique way: State Question 642 is a statute which will be passed or rejected by the People.

VOTE OF THE PEOPLE

State Question 642 will evidence by a popular vote of the People what the People truly believe regarding *Roe* and its

[6] Justice Blackmun bitterly but correctly stated in his *Webster* dissent, 492 U.S. at 556:

> It is impossible to read the plurality opinion [in *Webster*] and especially its final paragraph, without recognizing its implicit invitation to every state to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception.

progeny. No statute enacted by a legislature can do this — only a vote of the People can. A vote of the People is a more legitimate expression of their will than a statute passed by politicians. State Question 642 was written in the belief that if the People enacted it at an election, the United States Supreme Court (which is split on the abortion issue) might, could, and should modify *Roe*.

RULE OF FOUR

Today, the United States Supreme Court might deny a writ of certiorari in the cases involving the abortion statutes passed by the legislatures of Guam, Louisiana and Utah. In the circumstance of a statute having been passed by the People, however, the United States Supreme Court should invoke its "rule of four" to grant certiorari, thus allowing State Question 642 to serve as the test case it was intended to be.

IV
FOURTH PROPOSITION
No Jurisdictional Vehicle

WITHRAWAL AND ORDER

On March 23, 1992, Protestants Feldman and Little withdrew their federal and state constitutional claims to Initiative Petition No. 349. [*See:* Protestants' March 23, 1992, Brief, p. 2, paragraph 10.] On April 13, 1992, this Court entered an Order dismissing Protestants' challenge to the ballot title and striking Protestants' briefs. No other protests raising constitutional issues were filed.

BRIEFING ORDER

Protestants' March 23, 1992, withdrawal of their protest and this Court's Order of April 13, 1992, striking the Protestants' briefs and dismissing their ballot title challenges fatally impact this Court's July 14, 1992, briefing order. This Court is without any jurisdictional vehicle to decide constitutional issues in this proceeding.

CONCLUSION

THE RIGHT TO VOTE

A fundamental right of the People is at stake. The issue is whether the People of Oklahoma have the inherent right to vote to effect change.

Section 1 of the Oklahoma Bill of Rights provides:

> **All** political power is inherent in the people; and government is instituted for their protection, security and benefit,
>
> * * *
>
> and they have the right to alter or reform the same.

(Emphasis added.) The electorate is the cornerstone of democracy. All of us are entitled to participate in the system. The ultimate vehicle for participation by the People in their political system is the initiative petition. State Question 642 became the Initiative of the People on September 27, 1990, when 106,537 signatures[7] of Oklahoma citizens were filed with the Oklahoma Secretary of State.

ELECTION ALREADY SCHEDULED

In the briefing Order of July 14, 1992, five Justices of this Court referred to "the holding of a costly and unnecessary election." The People do not consider State Question 642 to be a waste of their tax dollars. The People have made it evident by signing Initiative Petition 349 that they desire to vote on State Question 642, even at the expense of their tax dollars. Furthermore, certifying a vote on State Question 642 will not necessitate the holding of a costly election. An election is already scheduled for November 3, 1992. The only additional cost to be incurred if State Question 642 is set for the scheduled November 3, 1992, election will be the printing of the 141 word Ballot Title on the ballot.

SACRED RIGHT

Only seven months ago, in *In Re Initiative Petition No. 348*, 820 P.2d 772 (Okl. 1991), the right to petition for a vote of the People to effect change was reaffirmed by the Oklahoma

[7] Stipulation 15(c) of the Pre-Trial Order.

Supreme Court as a sacred right to be carefully preserved. Justice Lavender wrote the opinion for the Court and Justices Simms and Kauger concurred in the result. The sole dissent was by Justice Doolin who did not write an opinion. In Justice Lavender's majority opinion (joined by Justice Summers) the Court quoted with approval *Ruth v. Peshek*, 5 P.2d 108 (Okl. 1931), an Oklahoma Supreme Court Opinion written 57 years before the core political speech decision of the United States Supreme Court in *Meyer, supra*. The Oklahoma Supreme Court stated at 820 P.2d 776:

> The initiative and referendum is the machinery whereby self-governing people may express their opinion in concrete form upon matters of public concern. **If the people are to be self-governed, it is essential that they shall have a right to vote upon questions of public interest and register the public will.**

(Emphasis by the Court.)

THE THOUGHTFUL DECISION

Oklahoma citizens signed Initiative Petition 349 because they want an answer from the People of Oklahoma — one way or the other — on an important question. The question upon which the People are demanding the right to vote is not a passion of the moment. The demanded vote is the culmination of years of scholarly and public debate about *Roe*. Even the majority in *Casey* conceded that "the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addessed." *Casey* at 60 U.S.L.W. 4803. The *Casey* majority then discussed two of the darkest periods in the Supreme Court's history, the holdings in *Lochner v. New York*, 198 U.S. 45 (1905) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), both of which were ultimately overruled in spite of *stare decisis* because there came a point in time when the "thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Casey* at 60 U.S.L.W. 4803.

LET THE PEOPLE DECIDE

The Protestants (now joined by the Attorney General) continue their extraordinary efforts, without any jurisdictional vehicle to do so, to prevent the People from thoughtfully expressing, through their votes, whether they could accept or reject a decision to modify *Roe*. Are the Protestants (and the Attorney General) so afraid of the will of the People? The only thing that will happen if this Court certifies an election is that the People of Oklahoma will be allowed to vote.

POWER VERSUS RIGHT

This Court was prepared to certify an election on State Question 642 but now waivers on the brink of suppressing the vote of the People. Proponents submit that this Court should not deny the People's right to be heard. Let the People vote.

Respectfully submitted,

PRAY, WALKER, JACKMAN,
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 24th day of July, 1992, a true and correct copy of the foregoing Brief was deposited in the U.S. mail, postage fully prepaid thereon to:

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/s/ Kevin M. Abel
Kevin M. Abel, OBA 104

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 16 1992
JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**Case No. 76,437**
	)	
STATE QUESTION NO. 642	)	

PROPONENTS' MOTION TO DISQUALIFY
THE ATTORNEY GENERAL

COME NOW the Proponents, in the alternative to the Proponents' Rule 6 Suggestion to the Court filed on July 15, 1992, and move the Court to disqualify the Attorney General from submitting a brief pursuant to the court's July 14, 1992, briefing Order.

Proponents' Brief in support of this Motion follows.

ARGUMENT

On July 14, 1992, this Court entered a briefing Order directing Protestants Feldman and Little, Proponents, and the Attorney General to file briefs on or before Friday, July 24, 1992:

> ...addressing *Planned Parenthood* [v. Casey] and its impact on the constitutionality of the proposed ballot title and the substance of Initiative Petition No. 349.

ON APRIL 13, 1992, THIS COURT ENTERED AN ORDER, WITH *NO* DISSENTS THEREFROM, *DISMISSING FELDMAN AND LITTLE'S CHALLENGE TO THE BALLOT TITLE AND STRIKING THE PROTESTANTS FELDMAN AND LITTLE'S BRIEFS*. A copy of the April 13, 1992, Order is annexed hereto. As a consequence of the April 13, 1992 Order, the ballot title issues challenged in the briefs of Feldman and Little are without legal cognizance, having been dismissed and stricken by this Court. Furthermore, on March 23, 1992, Protestants Feldman and Little withdrew their federal and state constitutional claims to the substance of Initiative Peti-

tion No. 349. [*See:* Protestants' March 23, 1992 Brief, page 2, paragraph 10.]

The role of the Attorney General in an initiative petition proceeding has been fixed by the Oklahoma Legislature in 34 O.S. §9 (D) (3). The Attorney General's only role is to determine whether "the proposed ballot title is in legal form and in harmony with the law." If the Attorney General determines that it is not, then the Attorney General shall prepare and file a ballot title which conforms to the law. On January 7, 1991, the Attorney General filed the annexed ballot title with the Secretary of State, thereby concluding the Attorney General's involvement in this matter. Even if Feldman and Little's state and federal constitutional protest had not been dismissed on March 23, 1992, and even if this Court had not entered its Order of April 13, 1992, dismissing the ballot title challenge and briefs of Feldman and Little, the Attorney General would have no statutory or Oklahoma constitutional standing to reenter this proceeding.

There is an inherent dilemma requiring the Attorney General to participate at this stage. Protestants have indicated that they intend to file a federal declaratory judgment action should State Question 642 be certified for a vote of the people and thereafter passed. The responsibility for defending the new statute in a federal declaratory judgment action would fall upon the Attorney General. The Attorney General's ability to defend the new statute would be irreparably compromised by a premature requirement to brief constitutionality at this time.

PRAYER

Proponents pray that the Attorney General be disqualified from filing a brief pursuant to this Court's Order of July 14, 1992, because:

1. the sole statutory function of the Attorney General in this proceeding was concluded on January 7, 1991;
2. the Attorney General has no further statutory or Oklahoma Constitutional standing to participate in this

proceeding;[1] and

3. the Court's briefing Order would impose an irreconcilable conflict upon the Attorney General in the execution of the duty of defending Oklahoma statutes in federal declaratory judgment actions.

Proponents pray that the Court expedite consideration of this Motion before the Attorney General files a brief.

Respectfully submitted,

PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR

By: /s/ Kevin M. Abel

Kevin M. Abel, OBA #104
William A. Caldwell, OBA #11780
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900 Oneok Plaza
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(918) 584-4136

ATTORNEYS FOR PROPONENTS

[1] This is all the more true since Feldman and Little's Constitutional protest was withdrawn on March 23, 1992 and the Court ordered a dismissal of Feldman and Little's ballot title challenges and briefs on April 13, 1992, thereby destroying any jurisdictional vehicle for this Court to consider the constitutionality of State Question 642 or the ballot title.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 16th day of July, 1992, a true and correct copy of the foregoing was deposited in the U.S. mail, postage fully prepaid thereon, to:

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Feldman and Little

/s/ Kevin M. Abel
Kevin M. Abel, OBA 104

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 13 1992
JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**Case No. 76,437**
	)	
STATE QUESTION NO. 642	)	

ORDER

On the proponents' motion, the attempt by the protestants Feldman and Little to *challenge the ballot title* in this proceeding is *dismissed.* The applications of the *protestants* to file briefs on the ballot title issue are denied, and the *briefs are ordered stricken,* consequent upon the protestants' failure to file a petition within the ten-day interval prescribed by 34 O.S. 1991 §10, or within ten days of the date the protestants acknowledge receipt of actual notice of the filing with the Secretary of State of the Attorney General's ballot title. *McCullough v. Safeway Stores, Inc.*, 626 P.2d. 1332 (Okl. 1981).

Consideration of the proponents' motion to dismiss the protestants' exceptions to the report of the referee is deferred until the decisional stage of this proceeding.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 13TH DAY OF APRIL, 1992.

/s/ Ralph B. Hodges
VICE CHIEF JUSTICE

OPALA, C.J., HODGES, V.C.J., LAVENDER, SIMMS, HARGRAVE, WILSON AND KAUGER, J.J. – CONCUR

ROBERT H. HENRY
ATTORNEY GENERAL
STATE OF OKLAHOMA
January 7, 1991

FILED
JAN -7 1991
OKLAHOMA SECRETARY
OF STATE

Hannah Atkins
Secretary of State
State Capitol Building
Oklahoma City, OK 73105

Re: Ballot Title for Initiative Petition No. 349
State Question No. 642

Dear Secretary Atkins:

The Attorney General has received your letter dated January 2, 1991, requesting review of the subject Ballot Title as required by 34 O.S. Supp. 1980, §9 (D). As a Title 34 Ballot Review, the following does not constitute an Attorney General's opinion on the merits or constitutionality of the underlying proposed change in the law. The Ballot Title as proposed by you reads as follows:

> This measure would limit abortion in Oklahoma. It would not allow abortions except in four cases. The first case is grave harm to the mother's physical or mental health. The second case is rape. The third case is incest. The fourth case is grave mental or physical birth defects in the unborn child. This measure would punish a person who does an unlawful abortion on someone else. It would also punish a person who helps someone get an abortion and who knows the abortion is unlawful. The punishment would be for four years or more in prison. This measure would change and renumber 63 O.S. 1981, §§ 1-730, 1-738, 1-739, and 1-741. It would remove 21 O.S. 1981, §§ 713, 714, 861 and 862. It would also remove 63 O.S. 1981, §§ 1-731, 1-732, 1-733, 1-734, 1-736 and 1-737.

January 7, 1991
Page 2

The Attorney General has reviewed the proposed official Ballot Title for the proposed statutory amendment under Initiative Petition No. 349, State Question No. 642, and finds that the Title is not in legal form and in harmony with the law. Accordingly, we have prepared the following ballot title for filing with your office, pursuant to the provisions of 34 O.S. Supp. 1990, §9 (D) (3).

BALLOT TITLE

This measure would limit a woman's ability to obtain an abortion in Oklahoma. It would allow a woman to obtain an abortion in four cases: 1) in the case of grave harm to the woman's physical or mental health; 2) in the case of rape; 3) in the case of incest; or 4) in the case of grave mental or physical birth defects in the unborn child. The measure would punish a person who performs an unlawful abortion on someone else. It would also punish a person who helps a woman obtain an unlawful abortion and who knows the abortion is unlawful. The punishment would be four years or more in prison. This measure will renumber some of the abortion laws and change and remove other laws on who may perform abortions, when abortions may be done, hospital regulations for abortions and change the current criminal penalties for performing abortions.

Shall the proposed statutory amendment be approved?

( ) Yes, for the Statutory Amendment
( ) No, against the Statutory Amendment

Sincerely,

/s/ Robert H. Henry

ROBERT H. HENRY
ATTORNEY GENERAL

RHH/pdl
abortion.ballot

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 15 1992
JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**Case No. 76,437**
	)	
STATE QUESTION NO. 642	)	

PROPONENT'S RULE 6
SUGGESTION TO THE COURT

COME NOW the Proponents, pursuant to Supreme Court Rule 6, and suggest the following facts to the Court:

1. On July 14, 1992, this Court entered a briefing Order based on the jurisdictional statement contained within the first sentence thereof:

> The constitutionality of Initiative Petition No. 349 (abortion petition/petition) IS challenged as an issue by the protestants Feldman and Little... . (Emphasis added.)

2. On March 23, 1992, Protestants Feldman and Little filed their Brief which stated on page 2 in paragraph 10 thereof:

> [T]HE PROTESTANTS HEREBY WITHDRAW THEIR FEDERAL AND STATE CONSTITUTIONAL CLAIMS.

3. The time for filing protests, including constitutional protests expired ten (10) days from December 26, 1990, that is, on January 7, 1991.

WHEREFORE, the Proponents suggest that there is no jurisdictional basis to consider the constitutional challenges heretofore withdrawn by Feldman and Little on March 23, 1992, and the Order of July 14, 1992 should be vacated.

Respectfully submitted,

PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR

By: /s/ Kevin M. Abel
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William A. Caldwell, OBA #11780
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ATTORNEYS FOR PROPONENTS

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 15th day of July, 1992, a true and correct copy of the foregoing was deposited in the U.S. mail, postage fully prepaid thereon, to:

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Attorneys for Protestants Feldman and Little

/s/ Kevin M. Abel
Kevin M. Abel, OBA 104

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 14 1992
JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**No. 76,437**
	)	
STATE QUESTION NO. 642	)	

ORDER

The constitutionality of Initiative Petition No. 349 (abortion petition/petition) is challenged as an issue by the protestants Feldman and Little in their briefs in that the constitutional question as to the legality of the measure under the Due Process Clause of the Fourteenth Amendment of the United States Constitution seems to be fairly subsumed within certain of the other issues raised by these protestants. In In re *Supreme Court Adjustication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okla. 1975), we held that a decision on a constitutional question as to the legality of a measure proposed to be enacted into law by the people will be reached by this Court when raised by a party, if in the Court's opinion, reaching the issue may prevent the holding of a costly and unnecessary election. That finding has been reaffirmed by this Court on at least four subsequent occasions. In re *Initiative Petition No. 348*, 820 P.2d 772, 780 (Okla. 1991); In re *Initiative Petition No. 347*, 813 P.2d 1019, 1030 (Okla. 1991); In re *Initiative Petition No. 341*, 796, P.2d 267, 269 (Okla. 1990); In re *Initiative Petition No. 315*, 649 P.2d 545, 547-48 (Okla. 1982). These cases teach that when a constitutional challenge to a State Question is properly raised by a party protestant which challenges the constitutional legality of the proposed law *in toto* or in such substantial part so that a ruling in favor of the challenge would prevent a useless election because approval of the question would result in no more than the enactment of an unconstitutional and, therefore, unenforceable law this Court has the authority to decide the matter. From a review of the parties'

submissions, the constitutional challenge appears to go to the very heart of the proposed law, to wit: the constitutional validity of limiting abortion to the four defined circumstances contained in the initiative petition.

Because the United States Supreme Court's opinion in *Planned Parenthood v. Casey,* 60 U.S.L.W. 4795 (U.S. June 29, 1992), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1992), promulgated on June 29, 1992, appears to afford greater rights than those guaranteed by Initiative Petition No. 349, the proponents, the protestants, and the Attorney General are ordered to submit simultaneous briefs to be filed within ten (10) days of the date of this order addressing *Planned Parenthood* and its impact on the constitutionality of the proposed ballot title and the substance of Initiative Petition No. 349. Additional briefing is not ordered on the other issues.

The time limits prescribed herein will not be extended. No briefs or papers filed herein after the due date provided in this order for their submission will be given consideration.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14 DAY OF JULY, 1992.

/s/ Robert E. Lavender

Acting Chief Justice

Lavender, Simms, Kauger, Summers, Watt, JJ. concur.

Opala, C.J., Hodges, V.C.J., Hargrave, Wilson, JJ. dissent.

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 14 1992
JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**No. 76,437**
	)	
STATE QUESTION NO. 642	)	

OPALA, C.J., dissenting.

I dissent from today's order by which the court asks for briefs on the constitutionality of this initiative petition. Remaining bound by my continued and unswerving commitment to the teachings of *Threadgill*,[1] I would not, in advance of submission, undertake to test the content of an initiative petition for its constitutional orthodoxy. *Threadgill* teaches that conformity of a measure's content to constitutional norms may not be judicially examined *before the petition's adoption as law*. Permissible preadoption constitutional challenges are only those which address fatally vitiating infirmities in the initiative process itself.[2] The electorate's effort

[1] Threadgill v. Cross, 26 Okl. 403, 109 P. 558 (1910).

[2] My commitment to *Threadgill*, *supra* note 1, is reported in several prior decisions. *See* In Re Initiative Petition No. 348, Okl., 820, P.2d 772, 781, 782 n.4 (1991) (Opala, C.J., concurring in result); In re Initiative Petition No. 347, State Question No. 639, Okl., 813 P.2d 1019, 1037 (1991) (Opala, C.J., concurring); In re Initiative Petition No. 349 (No. 76,437, February 20, 1991) (Opala, C.J., concurring in part and dissenting in part); In re Initiative Petition No. 341, Okl., 796 P.2d 267, 275 (1990) (Opala, V.C.J., concurring in result); In re Initiative Petition No. 317, Etc., Okl., 648 P.2d 1207, 1222 (1982) (Opala, J., concurring in the judgment); In re Initiative Petition No. 315, Etc., Okl., 649 P.2d 545, 554-555 (1982) (Opala, J., concurring in result).

at legislating directly should not be subjected to judicial scrutiny by attacks *other than those which target the petition's compliance with some sine qua non submission requirement.*

I.

Presubmission review of a measure's conformity to constitutional norms offends the time-honored "prudential rule."[3] Constitutional challenges to legislation before it becomes law are to be disallowed.[4] No necessity exists for presubmission resolution of content-based constitutional attacks on the petition because none of these challenges impairs the initiative petition's *legal fitness for submission to a vote* by the people.

In presubmission stages (a) the court cannot be sure that when the petition is submitted for a vote the electorate will adopt the measure as law and (b) there is *not* then a lively controversy in which antagonistic adversaries press for testing a legal norm's validity *against the backdrop of facts*

[3] The prudential rule of necessity, adhered to by all state and federal courts, *commands* that constitutional issues not be resolved in advance of strict necessity. In re Snyder, 472 U.S. 634, 642-643, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1986); I.N.S. v. Chadha, 462 U.S. 919, 937, 103 S.Ct 2764, 2776, 77 L.Ed.2d 317 (1983); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); In Re Initiative Petition No. 347 State Question No. 639, *supra* note 2 at 1037 (Opala, C.J., concurring); Smith v. Westinghouse Elec. Corp., Okl., 732 P.2d 466, 467 n.3 (1987); Schwartz v. Diehl, Okl., 568 P.2d 280, 283 (1977); Dablemont v. State, Department of Public Safety, Okl., 543 P.2d 563, 564-565 (1975); *see also* Davis v. B.F. Goodrich, Okl., 826 P.2d 587, 593-594 (1992) (Opala, C.J., concurring); In re Initiative Petition No. 348, *supra* note 2 at 781, 782 n.4 (Opala, C.J., concurring in result); Johnson v. Walters, Okl., 819 P.2d 694, 708, 712 n.26 (1991) (Opala, C.J., concurring in part and dissenting in part); State ex rel. Okl. Bar Ass'n v. Lobaugh, Okl., 781 P.2d 806, 813 (1988) (Opala, J., dissenting); In Re Initiative Petition No. 341, Okl., 796 P.2d 267, 275 (1990) (Opala, V.C.J., concurring in result).

[4] *See* cases cited *supra* note 3.

unfolded when the measure came to be applied as law.[5] Where, as here, there is no *forensic scenario* in the context of which enforceable law's application is challenged, courts will not assess the attacked norm's constitutional conformity *in vacuo*.[6] Any departure from these basic teachings of *Threadgill* creates an impermissible burden on the people's fundamental-law power to initiate and pass measures for a change in the state's constitution as well as in her statutes.[7]

[5] *See* Grodin, *In Pursuit of Justice* at 106 (Univ. of Cal. Press 1989); Gordon and Magleby, Preelection Judicial Review of Initiatives and Referendums, 64 Notre Dame L.R.298, 302 (1989); *see in this connection* Grossman, The Initiative and Referendum Process: The Michigan Experience, 28 Wayne L. Rev. 77, 111 (1981); Note, The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?, 53 Fordham L.Rev. 919, 921-22 (1985).

[6] Smith v. Westinghouse Elec. Corp., *supra* note 3.

[7] The constitutional provisions governing the initiative and referendum are Art 5, §§ 1-8, Okl. Const. Section 1 provides:

> "The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but *the people reserve to themselves the power to propose laws and amendments* to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." (Emphasis added.)

In Oklahoma Tax Commission v. Smith, Okl., 610 P.2d 794, 807 (1980), we stated that Art. 5, §§ 1, 2 and 7, together "comprise an initiative system whereby both the people and the Legislature may propose legislation independently, and neither *can block the effort of the other during the process*...." Our teaching in *Smith* applies with equal force to bar judicial as well as legislative interference with initiative process. Courts should be loath to impose judicial restraint on the electorate's power to make law. As the Arizona Supreme Court aptly remarked in State v. Osborn, 16 Ariz. 247, 143 P. 117, 118 (1914), to place court-imposed restrictions "would be tantamount to claiming the power of life and death over every initiated measure by the people. It would limit the right of the people to propose only valid laws, whereas the other lawmaking body, the Legislature, would go untrammeled as to the legal soundness of its measures."

II.

In pre-adoption stages *no one has standing* to assert a content-based challenge to an initiative or referendum petition.[8] *No person can be adversely affected by or have a litigable interest in a measure that is not enforceable as law.* No showing of actual or threatened injury can be made before the measure stands adopted.

Once an initiative petition has passed muster under the threshold test for submission to a vote of the people by meeting the *sine qua non* submission requirements,[9] *no* constitutional attacks should be entertained to the *measure's* substantive provisions in preelection stages. All these challenges must await the measure's adoption and its application *in the context of a lively postadoption controversy between antagonistic adversaries with legal standing to press challenges.*

In sum, because of my undiminished commitment to *Threadgill's* teachings, I would not today ask for briefs on the conformity of the measure's substantive content to constitutional norms, state or federal.[10]

[8] For an initiative to pass the threshold test it must (a) be in substantial compliance with the *sine qua non* procedural requirements for submission, (b) address but a single subject [In re Initiative Petition No. 344, Okl., 797 P.2d 326, 330 (1990); In re Initiative Petition No. 342, Okl., 797 P.2d 331, 333 (1990)]; and (c) embrace content appropriate for lawmaking by the people [In re Supreme Court Adjudication, Etc., Okl., 534 P.2d 3 (1975)]; *see also in this connection* In re Initiative Petition No. 347, *supra* note 2 (Opala, C.J., concurring).

[9] *See supra* note 8.

[10] "The only options available as a remedy *against invasive initiative power* are (a) to curb — as Justice Mosk suggests — the people's power to create chaos by constitutional amendment defining areas of regulation that lie outside the reserved power of initiative or (b) to act judicially and invalidate an actually *adopted measure when it visits crippling damage to the operations of government by causing institutional paralysis.*" In Re Initiative Petition No. 348, *supra* note 2 at 787 (Opala, C.J., concurring in result). *See* Kennedy Wholesale v. Bd. of Equalization, 806 P.2d 1360, 1367 (Cal. 1991) (Mosk, J., concurring), for Justice Mosk's observations about the limits of the electorate's power to legislate by initiative petition.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 14 1992
JAMES W. PATTERSON
CLERK

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**No. 76,437**
	)	
STATE QUESTION NO. 642	)	

HODGES, V.C.J., with whom OPALA, C.J. and HARGRAVE, J., join, dissenting.

I dissent from today's decision to *sua sponte* direct the parties to brief the impact of *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795 (U.S. June 29, 1992), on the initiative. Two weeks have passed since *Casey* was handed down and neither the proponents nor the protestants have asked us to address its impact on the important constitutional issues. Further, an opinion approving the initiative petition for submission to a vote of the people had been prepared and considered by this Court and was in the process of being readied for publication prior to *Casey's* pronouncement.

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 31 1990
JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**Case No. 76,437**
	)	
STATE QUESTION NO. 642	)	

PETITION TO PROTEST INITIATIVE PETITION NO. 349 STATE QUESTION NO. 642

COME NOW the Protestants, Nancy Feldman and Kim Little, pursuant to Okla. Stat., tit. 34, § 8, to file their petition to protest the legal sufficiency of Initiative Petition No. 349, State Question No. 642. In support hereof, the Protestants state:

1. The Protestants, Nancy Feldman and Kim Little, are citizens of the State of Oklahoma and residents and registered voters in Tulsa County, State of Oklahoma;

2. The Proponent of Initiative Petition No. 349 is Fred W. Sellers, Jr. through an organization he established and titled Oklahoma Coalition to Restrict Abortion;

3. This Court has exclusive original jurisdiction to hear protest to the sufficiency of initiative petition. Okla. Stat., tit. 34, §8.

4. Initiative Petition No. 349 seeks to submit to the voters of this State a proposal to revise significantly Oklahoma's laws concerning abortion so as to restrict severely reproductive choices in Oklahoma;

5. Initiative Petition No. 349 was delivered to this Court on October 10, 1990, and the Court determined that such petition had one hundred four thousand, one hundred thirty-one (104,131) presumptively valid signatures. The required number of signatures for the initiative petition was calculated by the Secretary of State to be 93,683. Since Initiative Petition No. 349 on its face bore a suffi-

cient number of signatures, this Court ordered the Secretary of State to cause to be published a notice of the filing of Initiative Petition No. 349 and the apparent sufficiency thereof;

6. The legal notice required under Okla. Stat., tit. 34, §8 was published in *The Tulsa World* on December 26, 1990, thus initiating the ten (10) day protest period;

7. As will be noted below, the Protestants will challenge the wording of the ballot title of the Initiative Petition No. 349, but they will not at this time challenge the wording for purposes of fixing the official ballot title for an election since the ballot title process, required under Okla. Stat., tit. 34, §9, has not yet taken place and therefore such a challenge is premature. *Matter of Proposed Ballot Title*, 672 P.2d. 1166, 1167 (Okl. 1983).

Initiative Petition No. 349 is Legally Deficient on its Face

8. Initiative Petition No. 349 is legally deficient on its face and should be declared invalid for the reason that its wording is deceptive and seriously misleading so as to conceal many of its significant effects and thereby deprive signers of their right to know what it is they were being asked to approve, as more specifically described below:

   (a) The "ballot title" of Initiative Petition No. 349, as circulated, failed to describe many significant changes in law the proposal would effect;

   (b) The gist of Initiative Petition No. 349, as circulated, failed to describe many significant changes in law the proposal would effect;

   (c) The Initiative Petition No. 349, as circulated, told signers that the proposal will repeal many significant Oklahoma Statutes, but failed to apprise signers as to the effects of those repeals;

   (d) Section 2. (B) of Initiative Petition No. 349, as circulated, told signers that the measure will give fertilized ovum in female bodies all the rights of

natural persons under Oklahoma law, but it failed to apprise signers as to the many significant changes in the law this extension of personhood will effect;

(e) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective signers that under the proposal abortions will be prohibited except in certain narrow circumstances, but in fact the proposal if approved will legally permit all females to perform abortions on themselves at any time up to the onset of childbirth;

(f) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective signers that under the proposal abortions will be prohibited except in certain narrow circumstances, but in fact the proposal if approved will permit all females who were aged sixteen (16) or under at the time they were inpregnated to obtain an abortion any time prior to the onset of childbirth;

(g) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective signers that under the proposal abortions will be prohibited exept in certain narrow circumstances, but in fact the proposal if approved will permit all females who were suffering from mental illness or unsoundness of mind at the time they were impregnated to obtain an abortion at any time up to the onset of childbirth;

(h) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective signers that under the proposal abortions will be prohibited except in certain narrow circumstances, but in fact the proposal if approved will permit all females qualifying for an abortion under the proposal's exceptions to obtain an abortion at any time up to the onset of childbirth;

(i) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective

signers that the proposal would permit females inpregnated as a result of rape or incest to obtain legal abortions, but in fact the proposal attaches, in language only legally or medically trained persons are likely to understand, so many conditions to obtaining an abortion under such circumstances as to make it all but impossible for victims of rape and incest to find doctors willing to perform abortions;

(j) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective signers that the proposal would permit all females who would suffer grave harm to their physical or mental health if their pregnancies were to continue to be able to obtain a legal abortion, but in fact the proposal attaches, in language only persons trained in law, medicine or psychology are likely to understand, so many conditions to obtaining an abortion under such circumstances as to make it all but impossible for women facing such danger to find doctors willing to perform the abortions.

(k) Initiative Petition No. 349, as circulated, was drafted in a manner so as to induce the belief in prospective signers that the proposal will permit all females carrying fetuses which are likely to be born with grave mental or physical defects to obtain a legal abortion, but in fact the proposal attaches, in language only legally and medically trained persons are likely to understand, so many conditions to obtaining an abortion under such circumstances as to make it all but impossible for women facing such danger to find doctors willing to perform the abortions.

9. Initiative Petition No. 349 is legally deficient on its face and should be declared invalid because it contains proposals so extensive and diverse that they cannot be described sufficiently in any ballot title limited to 150 words, as required under Okla. Stat., tit. 34, §9.

Initiative Petition No. 349 is Unconstitutional

10. Initiative Petition No. 349, as drafted, violates the Constitution of the United States in the following respects:

(a) It would prohibit many women from obtaining a safe and legal abortion prior to the time their fetuses reached the stage of viability in violation of their rights of privacy under the Due Process Clause of the Fourteenth (14th) Amendment. U.S. Const., Amend. XIV, § 1 as interpreted by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Webster v. Reproductive Health Services*, U.S. , 109 S. Ct. 3040, 106 L.Ed.2d 410 (1989);

(b) It would prohibit many women from choosing certain birth control methods currently considered to be legal and safe methods of birth control under federal and state law in violation of their rights of privacy under the Due Process Clause of the Fourteenth (14th) Amendment. U.S. Const., Amend. XIV, §1 as interpreted in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965);

(c) It would compel victims of rape to disclose details of the rape incident prior to the time they are likely to know they are pregnant, as a prerequisite for obtaining an abortion, in violation of their rights of privacy under the Due Process Clause of the Fourteenth (14th) Amendment, U.S. Const., Amend. XIV, §1.

(d) It would adopt particular religious views as to when human life begins in violation of the Establishment of Religion Clause of the First (1st) Amendment. U.S. Const., Amend. I. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

(e) It would adopt the particular religious views of some religions as to when human life begins, thereby violating the Free Exercise of Religion rights of individuals whose religious views differ on the question of when human life begins by denying them the right to take action on the issue of abortion in accor-

dance with their religious beliefs. Free Exercise Clause of the First (1st) Amendment. U.S. Const., Amend. I.

(f) It purports to make it a crime for one person to aid and abet another person in acquiring an abortion in language so broadly drafted that it would chill protected speech in violation of individual rights of Free Speech under the Free Speech Clause of the First (1st) Amendment. U.S. Const., Amend. I.

(g) It would force women unable to qualify for exceptions to the prohibitions against abortion to risk their lives in childbirth, thereby making women the only class of persons under Oklahoma law required to risk their lives for the benefit of another in violation of the Equal Protection Clause of the Fourteenth (14th) Amendment. U.S. Const., Amend., XIV, §1.

(h) It provides women aged sixteen (16) and under, and women who choose to self-abort, less restrictive access to abortion than women aged seventeen or older who do not wish to self-abort, thereby discriminating against the older women who desire medically safe abortions in violation of their rights under the Equal Protection Clause of the Fourteenth (14th) Amendment. U.S. Const., Amend. XIV, §1.

(i) Its provisions stating what constitutes criminal acts of abortion, criminal acts in aiding and abetting the acquisition of a criminal abortion, exceptions to the criminal provisions, and the requirements that must be met to qualify for the exceptions are drafted in language so vague and imprecise as to make it all but impossible for persons reading the law to know how to comply with it in violation of their Due Process Rights under the Due Process Clause of the Fourteenth (14th) Amendment. U.S. Const., Amend. XIV, §1.

11. Initiative Petition No. 349, as drafted, violates the Constitution of the State of Oklahoma in the following

respects:

(a) It would prohibit many women from obtaining a safe and legal abortion prior to the time their fetuses reached the stage of viability in violation of their "inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry under Okla. Const., art. 2, §2, and in violation of their Due Process rights under Okla. Const., art. 2, §7.

(b) It would prohibit many women from choosing certain birth control methods currently considered to be legal and safe methods of birth control under federal and state law in violation of their "inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry" under Okla. Const., art. 2, §2, and in violation of their Due Process rights under Okla. Const., art. 2, §7;

(c) It would compel victims of rape to disclose details of the rape incident prior to the time they are likely to know they are pregnant, as a prerequisite for obtaining an abortion, in violation of their "inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry" under Okla. Const., art. 2, §2, and in violation of their Due Process rights under Okla. Const., art. 2, §7.

(d) It would adopt particular religious views of some as to when human life begins in violation of Okla. Const., art. 2, §5.

(e) It would adopt the particular religious views of some religions as to when human life begins, thereby violating the Free Exercise of Religion rights of individuals whose religious views differ on the question of when human life begins by denying them the right to take action on the issue of abortion in accordance with their religious beliefs in violation of their rights of religious liberty secured by Okla. Const., art. 1, §2.

(f) It purports to make it a crime for one person to aid and abet another person in acquiring an abortion in language so broadly drafted that on its face it violates individual rights of Free Speech under Okla. Const., art. 2, §22.

(g) Its provisions stating what constitutes criminal acts of abortion, criminal acts in aiding and abetting the acquisition of a criminal abortion, exceptions to the criminal provisions, and the requirements that must be met to qualify for the exceptions are drafted in language so vague and imprecise as to make it all but impossible for persons reading the law to know how to comply with it in violation of their Due Process Rights under Oklahoma Const., art. 2, §7.

(h) It will force women unable to qualify for exceptions to the prohibitions against abortion to risk their lives in childbirth, thereby making women the only class of persons under Oklahoma law required to risk their lives for the benefit of another in violation of their rights to equal protection under Okla. Const., art. 2, §§ 2, 7.

(i) It provides women aged sixteen (16) and under, and women who choose to self-abort, less restrictive access to abortion than women aged seventeen or older who do not wish to self-abort thereby discriminating against the older women who desire medically safe abortions in violation of their rights to equal protection under Okla. Const., art. 2, §§ 2, 7.

(j) It would insulate from liability medical institutions and medically trained persons who injure women by refusing to provide them with abortions under conditions where injuries are likely to arise if a pregnancy continues in violation of Okla. Const., art. 2, §6 and Okla. Const., art. 23, §7.

Challenges to Initiative Petition No. 349 Requiring Evidence

12. The Petitions will offer evidence in support of their

allegations contained in paragraphs 8. (i), (j), (k); 10. (b), (c), (d), (e), (g), (h), & (i); and 11. (b), (c), (d), (e), (g), (h), (i), & (j) above.

13. The Petitioners will offer evidence to show that the process by which Initiative Petition No. 349 was circulated failed to give prospective signers any opportunity to understand many of the substantial effects the proposal will have on Oklahoma law, thereby invaliding the entire signature collection process.

WHEREFORE, this Court is urged to grant Protestants the following relief:

1. The Court should accept jurisdiction of this Protest, set a briefing schedule, and appoint a referee for purposes of hearing the evidentiary challenges;

2. The Court should declare Initiative Petition No. 349 legally deficient on its face for reason that its wording is deceptive and seriously misleading so as to conceal many of its significant effects and thereby deprive signers of their right to know what it is they were being asked to approve;

3. The Court should declare Initiative Petition No. 349 legally deficient on its face for the reason that it contains proposals so extensive and diverse that they cannot be described sufficiently in any ballot title limited to 150 words, as required under Okla. Stat., tit. 34, §9;

4. The Court should declare Initiative Petition No. 349 invalid for the reason that it violates individual rights protected by the Constitution of the United States;

5. The Court should declare Initiative Petition No. 349 invalid for the reason that it violates individual rights protected by Oklahoma's State Constitution;

6. The Court should declare Initiative Petition No. 349 invalid for the reason that the process by which it was circulated failed to give prospective signers any opportunity to understand the substantial effects the proposal will have on Oklahoma law, thereby invaliding the entire

signature collection process.

7. The Court should grant such other relief as the Petitioners may be entitled.

Respectfully submitted,

By: /s/ Thomas Dee Fraiser

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By: /s/ Laura Emily Frossard

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By: /s/ Gary Dean Allison

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Tulsa, Oklahoma 74104
(918) 631-3052

CERTIFICATE OF MAILING

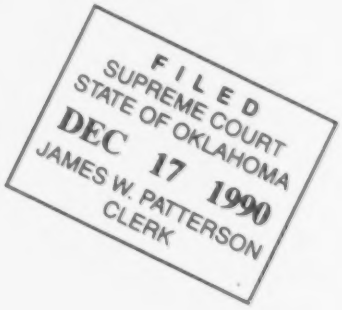
I hereby certify that on the 28th day of December, 1990, a true and correct copy of the foregoing was deposited in the U.S. mail, certified, return receipt requested, with the proper postage thereon affixed to:

Fred W. Sellers, Jr.
Oklahoma Coalition to Restrict Abortion, Inc.
P.O. Box 2460
Norman, OK 73070

/s/ Thomas Dee Frasier
Thomas Dee Frasier

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:	)	
	)	
INITIATIVE PETITION NO. 349	)	**Case No. 76,437**
	)	
STATE QUESTION NO. 642	)	



THE STATE OF OKLAHOMA TO
HANNAH D. ATKINS
SECRETARY OF STATE
STATE OF OKLAHOMA

ORDER

GREETINGS.

An initiative petition has been circulated in the State of Oklahoma, No. 349, the purpose of which is to submit to the electorate of the State for approval or rejection of State Question No. 642, proposing changes to, and renumbering of, 63 O.S. 1981 §§ 1-730, 1-738, 1-739 and 1-741, and the removal from the laws of the State of 21 O.S. §§ 713, 714, 861, 862 and 63 O.S. §§ 1-731, 1-732, 1-734, 1-736 and 1-737. The amendment of the laws of the State of Oklahoma proposed by this initiative petition would limit abortion in Oklahoma. It would not allow abortions except in four cases. The first case is grave harm to the mother's physical or mental health. The second case is rape. The third case is incest. The fourth case is grave mental or physical birth defects in the unborn child. This measure would punish a person who does an unlawful abortion on someone else. It would also punish a person who helps someone get an abortion and who knows the abortion is unlawful. The punishment would be four years or more in prison.

In accordance with 34 O.S. 1981 §8, this Court has caused an actual physical count of the signatures appearing on the several counterparts of said petition, as filed with the Secre-

tary of State, to be made. You are hereby made to know that the numbers of presumptively valid signatures on the several counterparts of said initiative petition, as filed with the Secretary of State, is One hundred and four thousand, one hundred and thirty-one (104,131).

You are hereby ordered and directed to forthwith cause to be published in at least one newspaper of general circulation in the State of Oklahoma, a public notice of the filing of the subject initiative petition, and of the determination of the apparent sufficiency thereof. Such notice shall incorporate information to the effect that any citizen of the State of Oklahoma may file a protest to the petition or an objection to the signature count by this Court by written notice to the Supreme Court of Oklahoma, and to the person or persons filing the said petition in your office whose names and addresses shall be set out in the notice, such written notice of protest or objection to be filed within ten (10) days after the date of publication of the notice hereby directed. Such filing may be effected by filing any such protest or objection with the Clerk of the Supreme Court of the State of Oklahoma. In the case of filing of an objection to the count, notice shall be given to any party filing a protest, if one was filed. All of the above is to be accomplished pursuant to the provisions of the statute codified as 34 O.S. 1981 §8.

Proceedings in the Supreme Court to determine any protests or objections to the subject initiative petition shall be commenced and proceed in accordance with 34 O.S. 1981 §8 and Rule 42 of the Supreme Court.

You are further directed to obtain verified proof of publication and notice herein directed and to submit the proof of publication to this Court as an exhibit to a pleading, or response to this order, to be filed in this cause with the Clerk of this Court upon completion of compliance with this order.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 17th DAY OF DECEMBER, 1990.

/s/ Rudolph Hargrave

RUDOLPH HARGRAVE
CHIEF JUSTICE

ALL JUSTICES CONCUR

F I L E D
JUN 29 1990
OKLAHOMA SECRETARY
OF STATE

State Question No.: 642 Initiative Petition No.: 349

"WARNING"

IT IS A FELONY FOR ANYONE TO SIGN AN INITIATIVE PETITION WITH ANY NAME OTHER THAN HIS OWN, OR KNOWINGLY TO SIGN HIS NAME MORE THAN ONCE FOR THE MEASURE, OR TO SIGN SUCH PETITION WHEN HE IS NOT A LEGAL VOTER.

INITIATIVE PETITION

TO THE HONORABLE HENRY BELLMON, GOVERNOR OF OKLAHOMA:

We, the undersigned citizens and legal voters of the State of Oklahoma, respectfully order that the following proposed law shall be submitted to the legal voters of the State of Oklahoma for their approval or rejection at the regular general election to be held on the 6th day of November, 1990, or conditionally, if unachievable by that date, at a special election subsequent to January 21, 1991, and each for himself/herself says: I have personally signed this petition; I am a legal voter of the State of Oklahoma, and my residence and post office are correctly written after my name. The time for filing this petition expires ninety days from June 29, 1990. The question we herewith submit to our fellow voters is:

SHALL THE FOLLOWING PROPOSED LAW BE APPROVED?

BALLOT TITLE

This measure would limit abortion in Oklahoma. It would not allow abortions except in four cases. The first case is grave harm to the mother's physical or mental health. The second case is rape. The third case is incest. The fourth case is grave mental or physical birth defects in the unborn child. This measure would punish a person who does an unlawful abortion on someone else. It would also punish a person who helps someone get an abortion and who knows the abortion is unlawful. The punishment would be four years or more in prison. This measure would change and renumber 63 O.S. 1981 Sections 1-730, 1-738, 1-739, and 1-741. It would

remove 21 O.S. 1981 Sections 713, 714, 861, and 862. It would also remove 63 O.S. 1981 Sections 1-731, 1-732, 1-733, 1-734, 1-736, and 1-737.

SHALL THE PROPOSED LAW BE APPROVED?

( ) YES – FOR THE LAW
( ) NO – AGAINST THE LAW

AN INITIATIVE

AN ACT RELATING TO PUBLIC HEALTH AND SAFETY; AMENDING AND RENUMBERING 63 O.S. 1981 SECTIONS 1-730, 1-738, 1-739, AND 1-741, AND REPEALING 21 O.S. 1981 SECTIONS 713, 714, 861, AND 862, AND 63 O.S. 1981 SECTIONS 1-731, 1-732, 1-733, 1-734, 1-736, AND 1-737, WHICH RELATE TO ABORTIONS; STATING THE INTENT OF THE PEOPLE; STATING THE FINDINGS OF THE PEOPLE AND PRINCIPLES OF LAW RELATING TO THE RIGHTS AND INTERESTS OF PREGNANT FEMALES AND OF UNBORN CHILDREN, THE SANCTITY OF UNBORN HUMAN LIFE, THE PREFERENCE FOR CHILDBIRTH OVER ABORTION, THE HARM OF UNRESTRICTED ABORTION, THE POINT AT WHICH THIS STATE'S COMPELLING INTEREST IN PROTECTING HUMAN LIFE ARISES, AND THE BEGINNING OF HUMAN LIFE; ADDING AND MODIFYING DEFINITIONS; MAKING CERTAIN ACTIONS UNLAWFUL; PROVIDING PENALTIES FOR CERTAIN ACTIONS; MAKING CERTAIN EXCEPTIONS FOR CASES INVOLVING THE HEALTH OF THE MOTHER, RAPE, INCEST, AND BIRTH DEFECTS; PROVIDING FOR THE REFUSAL TO PERFORM OR PARTICIPATE IN AN ABORTION; PROVIDING FOR EXCLUSIONS FROM THIS ACT; REQUIRING THE PREPARATION, FILING, AND MAINTENANCE OF CERTAIN STATEMENTS, CERTIFICATES, AND REPORTS; PROVIDING FOR THE SEVERABILITY OF INVALID OR UNCONSTITUTIONAL PROVISIONS; PROVIDING FOR CODIFICIATION; PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. Statement of Intent

It is the intention of the People of the State of Oklahoma to grant the right to life to all unborn humans and to restrict abortion to the full extent permitted by the Constitution of the United States, the decisions of the United States Supreme Court, and federal statutes.

Section 2. Findings and Principles of State Law.

(A) The People of the State of Oklahoma find by popular vote that:

(1) They desire to balance the rights of a pregnant female with the rights of her unborn child;

(2) The State of Oklahoma has a compelling interest in the sanctity of unborn human life;

(3) Childbirth is favored over abortion;

(4) Great harm is caused by unrestricted abortions;

(5) The terms pregnancy "trimesters" and "viability" of unborn children are not found in the text of the United States Constitution;

(6) The State of Oklahoma's compelling interest in protecting unborn human life does not come into existence only at the point of viability, and there is no rigid line distinguishing Oklahoma's right to restrict abortion either before or after viability;

(7) The life of each human begins at fertilization;

(8) The presence of a fertilized ovum in a female's body is the point at which Oklahoma's compelling interest in protecting unborn human life comes into existence;

(9) Unborn children have protectable interests in life, health, and well-being; and

(10) The abortion issue should be resolved by a vote of the People of the State of Oklahoma.

(B) From the effective date of this Act, the laws of this State should be interpreted and construed to acknowledge on behalf of an unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this State, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court.

Section 3. Definitions

(A) **"Fertilization"** means a reproductive process of human development, differentiation, cell mitosis, and replication which begins at the point in time when the head of a human sperm has penetrated the cell membrane of a human ovum.

(B) **"In vitro fertilization"** means the purposeful fertilization of a human ovum outside the body of a female.

(C) **"Unborn child"** means a human from fertilization within a female's body until birth or an in vitro fertilized ovum after the time of transfer to the female's body until birth.

(D) **"Pregnancy"** means the presence of an unborn child in a female's body.

(E) **"Abortion"** means the intentional termination of the life of an unborn child; abortion shall not mean the use of an intrauterine device, or the use of any other means of birth control which prevent ovulation or fertilization.

(F) **"Performing an abortion"** means administering to any pregnant woman, or prescribing for any pregnant woman, any medicine, drug, or substance, or using or employing any instrument or other means whatever upon any pregnant woman with the intent that an abortion result, and an abortion results.

(G) **"Physician"** means a physician or surgeon licensed by the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners or

their predecessors.

(H) "**Medical emergency**" means a condition which, on the basis of the attending physician's best professional judgment, necessitates an immediate abortion to avert the death or grave physical impairment of the mother.

Section 4. Crime of Abortion and Punishments

(A) Except as provided in Section 5, a person commits the crime of abortion if:

(1) Such person performs an abortion upon another person; or

(2) Such person intentionally or knowingly aids or abets the performing of an abortion upon another person.

(B) Every natural person guilty of the crime of abortion is punishable by imprisonment in the penitentiary for not less than four (4) years.

(C) Any person, other than a natural person, guilty of the crime of abortion is punishable by a fine not less than Ten Thousand Dollars ($10,000.00) but not exceeding One Hundred Thousand Dollars ($100,000.00).

Section 5. Exceptions

Abortion shall not be a crime under the following circumstances:

(A) (1) The abortion was necessary to save the life of the female or to avoid a grave impairment of the female's physical or mental health;

(2) For the purpose of determining grave impairment of a female's mental health in Section 5(A)(1), impairments or stresses produced by an unwanted birth, social stigma or embarrassment, interruption of life plans, or lack of financial resources, which have not resulted in psychosis or major depressive illness, shall not constitute grave mental impairment;

(B) The pregnancy resulted from rape as defined by Title 21, Section 1111 of the Oklahoma Statutes;

(C) The pregnancy resulted from incest as defined by Title 21, Section 885 of the Oklahoma Statutes; or

(D) The unborn child would be born with a grave physical or mental defect.

Section 6. Certification of Exceptions

(A) Regarding the performance of an abortion under any of the circumstances described in Section 5, the following statements and certifications shall be completed and maintained as provided in Section 6(A)(1), (2), and (3):

(1) Prior to an abortion under Section 5(A)(1), a physician shall certify in writing that, in the physician's best professional judgment, the abortion is necessary to save the life of the female, or is necessary to avoid a grave impairment of the woman's physical or mental health of the kind described in Section 5(A)(1). The complete medical basis of such finding shall be included in the certificate. The certifying physician may not perform or assist in the performance of the abortion, and shall not have any pecuniary interest, either direct or indirect, in the performance of the abortion. The certification must be completed and presented to the physician who will perform the abortion prior to performance of the abortion, unless the physician who performs the abortion also certifies that a medical emergency or other exceptional circumstance made it impracticable or impossible to obtain such certification prior to the abortion.

(2) Concerning an abortion under Section 5(B) or (C), the female shall affirm in a sworn statement the facts constituting the rape or incest, including, where known, the identity of the perpetrator. In the case of an act of rape, the statement must be given to a physician or law enforcement officer

within thirty (30) days after the act. In the case of incest, the statement must be given to the physician prior to the abortion. The physician shall certify in writing that an abortion due to rape or incest was performed in reliance upon the female's sworn statement.

(3) Concerning an abortion under Section 5(D), a physician shall certify in writing that, in the physician's best professional judgment, the unborn child has a grave physical or mental defect. The complete medical basis of the finding shall be included in the certificate. The certifying physician may not perform or assist in the performance of the abortion, and shall not have any pecuniary interest, either direct or indirect, in the performance of the abortion. The certification must be completed and presented to the physician who will perform the abortion prior to performance of the abortion, unless the physician who performs the abortion also certifies that a medical emergency or other exceptional circumstance made it impracticable or impossible to obtain such certification prior to the abortion.

(B) Any physician who provides a certificate, or any physician who performs an abortion in reliance on a certificate provided under Section 6(A), shall not be subject to liability under this Act, except where a certifying physician knowingly certifies to false information or a physician performs an abortion with knowledge that a certificate or statement contains false information.

Section 7. Abortions – Refusal to Perform or Participate – Exemptions

(A) No private hospital, private hospital director, or governing board of a private hospital in Oklahoma shall be required to permit abortions to be performed in that hospital. Refusal to permit an abortion, in accordance with a standard policy, shall not be grounds for civil

liability or a basis for disciplinary or other recriminatory action.

(B) No person may be required to perform or assist in performing an abortion or medical procedures in preparation for an abortion. Refusal to perform or participate in such medical procedures shall not be grounds for civil liability or a basis for disciplinary or other recriminatory action.

(C) The rights and immunities granted by this section shall not include medical procedures in which a female is in the process of spontaneous, inevitable delivery of an unborn child, or the death of the unborn child is imminent, or the procedures are necessary to prevent the death of the mother.

Section 8. Certificates and Abortion Reports

(A) The State Department of Health shall adopt and make available to all physicians the form of any certificates required under Section 6(A) and the form of an abortion report, both of which shall require disclosure of all medical facts pertinent to the abortion procedure, the specific exemption in Section 5 under which the abortion was performed, and information identifying the certifying physician. The certificates and abortion reports shall be encoded to enable cross referencing. The abortion reports shall be collated by the State Department of Health.

(B) Any physician who performs an abortion shall file an abortion report with the State Department of Health within ten (10) days after the abortion.

(C) Each certificate, to be maintained in the physician's confidential files, shall identify the female.

(D) The abortion report, to be filed with the State Department of Health, shall not contain the name of the female.

Section 9. Records

All hospitals shall keep records, including admission and

discharge notes, histories, results of tests and examinations, nurses' worksheets, social service records, and progress notes of patients. All physicians who perform abortions shall keep all statements and copies of all certificates and abortion reports required by this Act. Such records shall be maintained for a period of not less than seven (7) years.

Section 10. Exclusions

(A) This Act shall not prohibit:

(1) A female's decision to use any intrauterine device or use any other means of birth control which prevents ovulation or fertilization;

(2) The provision of medical advice to a pregnant female; or

(3) In vitro fertilization.

(B) This Act shall not be interpreted as creating a cause of action against a female for harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

Section 11. Repealer

21 O.S. 1981 Sections 713, 714, 861, and 862, and 63 O.S. 1981 Sections 1-731, 1-732, 1-733, 1-734, 1-736, and 1-737 are hereby repealed.

Section 12. Severability

The provisions of this Act are severable, and if any part or provision of this Act shall be held void, invalid, or unconstitutional, the decision of the Court so holding shall not affect or impair any of the remaining parts or provisions of this Act, and the remaining provisions of this Act shall continue in full force and effect.

Section 13. Emergency

It being immediately necessary for the preservation of the public peace, health, and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from the date of its passage.

SIGNATURES

The gist of the proposition is as follows:

This measure would limit abortions except in cases involving: grave harm to the mother's physical or mental health; rape; incest; or grave birth defects in the unborn child. It would establish penalties for unlawful abortions.

A "YES" vote is a vote in favor of this measure.
A "NO" vote is a vote against this measure.

	Signature of Legal Voter	Residence	City	Zip	County
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INSTRUCTIONS FOR CIRCULATORS: Circulators must be registered to vote in Oklahoma and must personally witness all signatures. ALL PETITION SIGNERS MUST BE REGISTERED TO VOTE IN OKLAHOMA. After each signer signs, turn this sheet over and print the **name only** in the corresponding numbered space provided. When all signatures have been obtained, fill out the circulator's affidavit on the back of this sheet in the presence of a notary public.

RETURN THIS PETITION TO: Fred W. Sellers, Jr.
P.O. Box 2460
Oklahoma City, OK 73070

AFFIDAVIT

STATE OF OKLAHOMA)
) S.S.
COUNTY OF _____)

I, _____ , being first duly sworn say:

That I am a qualified elector of the State of Oklahoma and that the following persons signed this sheet of the foregoing petition, and each of them signed his or her name thereto in my presence:

1. _____	11. _____
2. _____	12. _____
3. _____	13. _____
4. _____	14. _____
5. _____	15. _____
6. _____	16. _____
7. _____	17. _____
9. _____	18. _____
9. _____	19. _____
10. _____	20. _____

I believe that each has stated his or her name, post office, and residence correctly, and that each signer is a legal voter of the State of Oklahoma and the County of his or her residence as stated.

_____
Circulator's Signature

_____
Post Office or Residence Address

_____
City Zip Code

Subscribed and sworn to before me this ___ day of _____ , 1990.

_____
Notary Public

_____
Post Office or Residence Address

_____
City Zip Code

My Commission Expires:

_____

(SEAL)

MOTION FILED
NOV 25 1992

(2)

No. 92-784

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED SELLERS, JR.
Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

STATE OF OKLAHOMA'S MOTION FOR, LEAVE TO INTERVENE PURSUANT TO 28 UNITED STATES CODE, SECTION 2403(b)

SUSAN B. LOVING
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No. 92-784

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.

Petitioners,

vs.

NANCY FELDMAN and KIM LITTLE,

Respondents.

STATE OF OKLAHOMA'S MOTION FOR LEAVE TO INTERVENE PURSUANT TO 28 UNITED STATES CODE SECTION 2403(b)

The Attorney General of the State of Oklahoma, on behalf of the State of Oklahoma, pursuant to the provisions of 28 U.S.C. § 2403(b), respectfully requests that this Court grant the State of Oklahoma leave to intervene in this case to oppose the Petition for Writ of

Certiorari and to be heard on the question of the constitutionality of an Oklahoma Constitutional provision and statute called into question in the Petition for Writ of Certiorari.

In support of this Motion, the State of Oklahoma would show the Court as follows:

1. The Petition for Writ of Certiorari filed in this case calls into question the constitutionality of an Oklahoma statute and a provision of the Oklahoma Constitution (Petition for Writ of Certiorari, 4-5 and throughout).

2. Petitioners, in accordance with the provisions of 28 U.S.C. § 2403(b) and Sup. Ct. R. 29, have certified the fact of these constitutional challenges to the Attorney General of Oklahoma (Petition for Writ of Certiorari, 4-5).

3. Neither the State, nor any agency, officer, or employee was a party in the case below (Id.).

4. Under the provisions of 28 U.S.C. § 2403(b), a State, in a case such as this, can intervene to present evidence, if evidence is otherwise admissible, and to present argument on the question of constitutionality.

5. Under the authority of 28 U.S.C. § 2403(b), the State of Oklahoma desires to be heard on the constitutionality of the challenged Oklahoma laws, and wishes to file the accompanying Brief in Opposition to the Petition for Writ of Certiorari.

For the reasons stated above, the State of Oklahoma respectfully requests that this Court grant it leave to intervene as a party respondent and, at

this stage in the proceedings, file the accompanying Brief in Opposition to the Petition for Writ of Certiorari.

SUSAN B. LOVING
Attorney General of Oklahoma

NEAL LEADER
Assistant Attorney General

No. 92-784

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED SELLERS, JR.
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v.

NANCY FELDMAN and KIM LITTLE,
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On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF IN OPPOSITION OF INTERVENOR, THE STATE OF OKLAHOMA,

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Respondents.

BRIEF IN OPPOSITION OF INTERVENOR,
THE STATE OF OKLAHOMA

REASONS FOR DENYING THE WRIT

Introduction

The question presented in the Petition for Certiorari was one which the court below did not consider raised. Thus, it was not considered on the merits. If raised below, as claimed, it was raised at the eleventh hour in a final brief. No opportunity was afforded to respond: no

opportunity to develop a record on the issue was given.

In short, the question presented was not properly joined below, was not addressed by the parties, and thus was not adequately developed below. The record below is consequently a poor one on which to consider the issue tendered in the Petition.

Petitioners have been unable to cite even one case in which the question presented was discussed, or even raised. Thus, there is little reason to believe that the courts of the nation need this Court's guidance on the issue.

The Petitioners' unique theory of the First Amendment, which is the basis for the question presented, is not discussed or considered in any case known or presented. Their unique First Amendment theory is also flawed.

There is no need to address the question presented.

Nature of the Case Below

Under Oklahoma law, the people's right of initiative is limited. For example, to avoid log rolling, laws proposed by the initiative process are limited to one subject.[1] Also, laws proposed may not be repugnant to the United States

---

[1] Okla. Const. Art. XXIV, § 1. That section in pertinent part provides:

> No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; . . .

[Emphasis added.]

This limitation not only applies to constitutional amendments proposed by the Legislature, but also applies to amendments proposed by initiative petition. E.g., In re Initiative Petition No. 342, State Question No. 628, 797 P.2d 331 (Okla. 1990).

Constitution.[2] Initiative measures, prior to being placed on the ballot, are subject to challenge as being outside of these limits;[3] successfully challenged measures are not placed on the ballot.[4] In proceedings challenging either the sufficiency of the number of signatures supporting an initiative petition, or the legal sufficiency of the petition, the ultimate determination made is whether the proposed measure will appear on the ballot and be presented for a vote of the people.[5]

---

[2]Okla. Const. Art. II, § 1 (set out in full in Petition for Certiorari at p. 2), and In Re Initiative Petition 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (the decision below) (Petitioners' App. 12a).

[3]Okla. Stat. tit. 34, § 8 (1991) (set out in full at Petition for Certiorari, pp. 3-4).

[4] E.g., In re Initiative Petition No. 342, State Question No. 628, 797 P.2d 331 (Okla. 1990).

[5]Ballot titles for the proposed measure may also be challenged, but the issue in such proceedings is not whether

Petitioners' initiative proposal was found to be outside Oklahoma's limited initiative power because it was repugnant to the United States Constitution, and accordingly it was not placed on the ballot.

Proceedings Below

The challenges to Petitioners' initiative petition took three forms: (1) challenges to the sufficiency of the signatures supporting it; (2) challenges to the ballot title; and (3) challenges to the legal sufficiency of the petition--including a challenge based on the measure being outside of the people's limited initiative power because the proposed measure was "repugnant to the United States

---

the matter will be on the ballot. Rather, the issue in such cases is whether the proposed title is appropriate, if the measure were placed on the ballot. If not appropriate, the Supreme Court rewrites the ballot title. Okla. Stat. tit. 34, § 10 (1991).

Constitution." In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (Petitioners' App., 3a-4a.).

While these challenges presented multiple issues, the Oklahoma Supreme Court found a single issue to be dispositive of the entire case: whether the proposed law was repugnant to the United States Constitution, and therefore outside of the limited initiative powers reserved to the citizens of Oklahoma? In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug.4, 1992). (Petitioners' App. at 2a-4 and 12a.)

In finding the proposed measure repugnant to the United States Constitution, the Court read the Petitioners' final brief to concede that their initiative proposal was unconstitutional when it was drafted, unconstitutional when it was circulated, and unconstitutional at the time of their

briefing. Id. Because the Court found that the proposal was outside the people's initiative power, the measure was not placed on the ballot and not submitted to the people for a vote.

Petitioners' Unique Position

Petitioners assert that the Oklahoma Supreme Court's determination that the matter they submitted by initiative petition was repugnant to the United States Constitution and therefore was outside the limited initiative power of the citizens of Oklahoma and thus would not be submitted to a vote of the people, deprived Petitioners of their "free speech" right to advocate passage of the initiative measure "from certification through voting." (Emphasis added.) (Petition for Certiorari, 9-11). In taking this position, Petitioners present a unique question, based upon a unique theory of the law. A question so

unique, Petitioners have been unable to demonstrate that it has been raised in or considered by any court.

Faulty Premise Upon Which Petitioners' Position is Based

The argument that First Amendment "free speech rights" guarantee Petitioners the right to advocate passage of the proposed measure from "certification through voting" assumes that: 1) the measure in question is going to be voted upon, and 2) there is and will be a period that ends with a vote on the measure. These assumptions wholly ignore the fact that there will be no vote on the proposed measure because the measure was found outside the scope of the people's initiative power.

A finding that a measure proposed by initiative is outside the peoples' initiative power simply does not violate the free speech rights of those proposing the measure. For example, assume that a

state confers upon its citizens the right of initiative to amend the Constitution, but does not confer that right to amend statutes. In that state, initiatives seeking to amend statutes would be outside the scope of the peoples' power, and thus should not be placed on the ballot.

Similarly, under Oklahoma law, petitions can be found insufficient because they are outside the scope of the people's power, and thus not eligible of being presented for a vote.

Proponents' unique position apparently is that when a state creates an initiative petition process, no matter how limited, any petition--whether within or outside the limits of the initiative power--must proceed to a vote of the people. The Petitioners offer no case holding or even supporting their unique view of the First Amendment. Petitioners' reliance on Meyer

v. Grant, 486 U.S. 414 (1988), is particularly misplaced.

Petitioners' Reliance on Meyer v. Grant, To Support Their Unique View of the First Amendment, is Particularly Misplaced

Meyer v. Grant, struck down a Colorado law which prohibited proponents of an initiative petition from circulating it through the use of paid circulators. In the case below, the manner in which a petition can be circulated was not an issue.

In the case below, the dispositive issue was whether the initiative measure being proposed was within the scope of the people's limited initiative powers. Meyer made no holding on this issue and, in fact, did not even discuss it.

The question in Meyer dealt with the limits Colorado put upon the means to exercise the state-conferred right of initiative. The issue in the case below

was wholly different, it dealt with whether the proposed initiative measure was within the powers reserved to the people, and not with the means that could be used in exercising that power.

The Oklahoma law being challenged does not limit speech. Proponents of an initiative petition may advocate it through paid circulators, television, billboard, or any means they so desire.

The flaw in Petitioners' theory is even more apparent when their theory is applied in a slightly different context. Assume that a state requires candidates for Governor to be at least 30 years of age. A ruling that the State could not prohibit a candidate from paying circulators to obtain sufficient signatures to become a candidate, would not be a ruling that the candidate was qualified. Under Petitioners' unique First Amendment theory, a candidate who was unqualified because he

was only 25, would have to be placed on the ballot, so those who desired could support and vote for the unqualified candidate. Such an analysis, of course, does not track.

The issue of which means can be used to support an initiative proposal or a candidate is wholly separate from the issue of whether the candidate or initiative proposal is qualified to appear on the ballot. Petitioners seek to magically connect these matters--matters which are not logically connected. Thus, it is not surprising that the Petitioners have presented no case supporting their unique theory. In point of fact, the case below did not address the merits of the issue, though it was mentioned in passing.

Issue Presented in Petition For Certiorari Was Not Raised Below

The Oklahoma Supreme Court, in reviewing Petitioners' brief below, did not consider Petitioners to have raised a First Amendment claim:

> We understand the proponent's characterization of their petition as "core political speech" as additional emphasis for the importance of the initiative process and for placing the proposition on the November ballot--and not as an attempt to raise a First Amendment claim.

In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992). (Petitioners' App., 12a).

Rather the Court viewed Petitioners' "political speech" characterization as an attempt to balance their desire to have the proposal placed on the November ballot against the desire of other Oklahomans, as expressed in the Constitution, to limit the initiative power:

> It [Petitioners' argument] is, in effect, an argument that their "free speech" rights to advocate an unconstitutional law outweigh constitu-tional rights of all other Oklahomans that the Oklahoma Constitution should not be repugnant to the [United States] Constitution. . .

In Re: Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992). (Petitioners' App., 12a-13a).

Because the Oklahoma Supreme Court did not understand Petitioners' arguments to raise a free speech claim, the Court did not address the matter--though it was mentioned.

The Court considered the issue below to be: which of two alternatives was appropriate, that is, whether pre-submission or post-submission examination of the initiative proposal's compliance with the initiatives' limits was appropriate. The Court, following a long

line of Oklahoma cases,[6] held that addressing the "eligibility" of the initiative proposal prior to submission to the people was proper, because pre-submission review, avoids costly elections and avoids "misleading citizens about the legal effect of the proposition."[7]

Even if the decision of the Oklahoma Supreme Court could somehow be construed to have addressed the merits of the issue Petitioners raise here, the manner in which the issue was "raised," at the eleventh hour, with the resulting lack of an

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[6] In re Initiative Petition No. 348, 820 P.2d 772, 780 (Okla. 1991); In re Initiative Petition No. 347, 813 P.2d 1019, 1030 (Okla. 1991); In re Initiative Petition No. 341, 796 P.2d 267, 269 (Okla. 1990); In re Initiative Petition No. 315, 649 P.2d 545, 547-48 (Okla. 1982). In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma, 534 P.2d 3, 8 (Okla. 1975).

[7] In re: Initiative Petition No. 349, State Question No. 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (Petitioner's App., 9a-16a).

opportunity to respond or build a record on the issue, makes this case a poor case in which to examine the issue presented.

This Case Presents a Poor Vehicle to Examine the Issue Presented Because:

(1) If raised at all, the issue was raised in a last-minute brief;

(2) No Opportunity to respond was given;

(3) No opportunity to develop a record on the issue was given;

(4) No record on the issue was developed;

(5) The court below did not address the merits on the issue.

As noted above, the First Amendment issue which Petitioners present was not one which the Supreme Court of Oklahoma thought was raised below. In its July 14, 1992, Briefing Order, the Oklahoma Supreme Court asked for simultaneous briefs from the parties, and from the Attorney General, addressing Planned Parenthood v. Casey, _ U.S. ___, 112 S.Ct. 2791 (1992) and "its impact on the constitutionality of the

proposed ballot title and the substance of the Initiative Petition." (Supreme Court's Briefing Order, Petitioners' App., 88a-89a).

In response to this simultaneous briefing schedule, the Petitioners filed a brief which the Supreme Court read as conceding the unconstitutionality of their initiative petition:

> As we read the proponent's submission, they conceded that the initiative petition was unconstitutional when it was drafted, that it was unconstitutional when it was circulated, and that it is unconstitutional now. However, the proponents insist that we should allow the petition to go forward as an exercise in political advocacy.

In re Initiative Petition No. 349, State Question 642, 63 Okla. B.J. 2386 (Aug. 4, 1992) (Petitioners' App., 4a.)

This "political advocacy" prayer was "raised" for the first time, at the eleventh hour, in response to the

simultaneous briefing schedule on another issue. If Petitioners, in praying that the matter be placed on the ballot as an exercise of "political advocacy", intended to challenge the constitutionality of Oklahoma's Constitution and statutes, Petitioners did not make that clear.

Further, the State, who was not a party to the proceeding, was not notified of any challenge. Neither the parties, nor the State, was allowed to respond. No record was made on the issue, nor was the State permitted to present evidence or argument on the issue. Accordingly, even if the question presented cried out for this Court's immediate attention--which it does not--this case would present a poor vehicle for such consideration.

The question presented in the Petition is not one which was properly joined below, not one which the parties addressed below, and thus was not adequately developed

below. The record below, is thus a poor one on which to consider the issue tendered by Petitioners.

Even if the record below adequately developed and addressed the tendered issue, there is no immediate or pressing need to address it.

There is No Immediate or Pressing Need to Address the Issue Tendered by Petitioners

As mentioned above, Petitioners have been unable to find even one case addressing their unique view of the First Amendment. They have been unable to cite even one case in which it was raised or discussed. It thus appears that the courts of our nation are not in immediate need of this Court's guidance on the issue.

The question presented is a product of Petitioners' apparently unique free speech analysis--an analysis which fails to recognize the distinction between laws

which limit and restrict the means citizens may use in exercising a state-conferred power, and laws which define the scope of the state-conferred power. It may well be that the courts of the nation will never need guidance on the issue. At any rate, there is certainly no immediate need for this Court's guidance, and thus, this Court's limited resources are best spent addressing other issues--not the issue presented in the Petition.

CONCLUSION

The Petition For Writ of Certiorari Should Be Denied.

SUSAN B. LOVING
Attorney General of Oklahoma

NEAL LEADER
Assistant Attorney General

November, 1992

(3)

Supreme Court, U.S.
FILED
NOV 27 1992
OFFICE OF THE CLERK

No. 92-784

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

STATE QUESTION NO. 642

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

BRIEF FOR THE *AD HOC* COMMITTEE OF PETITION SIGNERS AND VOTERS IN SUPPORT OF A VOTE ON STATE QUESTION 642, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the expression attendant to the initiative petition process, from certification through voting, core political speech?

2. Does Oklahoma law, as construed and applied, violate the first and fourteenth amendments as a prior restraint on core political speech when the Oklahoma Supreme Court strikes from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision?

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COMES NOW the *Ad Hoc Committee of Petition Signers and Voters in Support of a Vote on State Question No. 642* and submits the following brief pursuant to Sup.Ct.R. 34.

CONSENT TO FILING

Both parties have consented to filing of this brief.[1] Letters memorializing this consent will be simultaneously filed with this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae is the *Ad Hoc* Committee of Petition Signers and Voters in Support of a Vote on State Question No. 642, a group formed solely to support the Proponents' petition for *certiorari*. A list of the individual members of the committee is at page 1a of the Appendix. The review sought by this petition is of an order by the Oklahoma Supreme Court striking State Question 642 from the ballot. The interest of the members of the *ad hoc* committee are twofold. *First,* all are voters who wanted to and would have participated in the debate and vote, had State Question No. 642 not been stricken from the ballot. *Second,* some actually signed the petition asking for the

[1] The Petitioners are represented by Kevin M. Abel. The petition was opposed by two groups of Protestants. However, one group solely protested the ballot title. The Protestants who raised the constitutional issue that is the subject of this petition were represented by Laura Emily Frossard.

vote that is now precluded by the Oklahoma Supreme Court decision.

If *certiorari* is not granted and the opinion reversed, the petition signers will be denied their right to petition the government to seek redress guaranteed by the First Amendment[2] and all members of the *ad hoc* committee would have been denied the right to publicly debate the issue framed by the petition, a right that is also guaranteed by the First Amendment to the United States Constitution.

ARGUMENT

The effect of the Oklahoma Supreme Court decision is judicial censorship contrary to the First Amendment. One-Hundred, Four-Thousand, One-Hundred and Thirty-One (104,131) registered voters in Oklahoma signed Initiative Petition 349 ("IP349") asking for a statewide vote on State Question 642. The Oklahoma Supreme court held that the number of signatures on IP349 was sufficient and that the petition was proper in all respects under Oklahoma constitutional and statutory laws authorizing an initiative petition. However, citing arguments by the

[2] Petitioners are technically only urging review for violation of the "free speech" clause in the First Amendment. However, as this court has previously held, the First Amendment right to petition clause is "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable'. . . . " *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).

attorney general for the State of Oklahoma that allowing such a vote would be "costly, divisive, and unnecessary," the Oklahoma Supreme Court held that the **proposed law** was inconsistent with the federal constitution and, accordingly, struck State Question 642 from the statewide ballot. "The legal resources of the parties, the people of Oklahoma, and the judiciary would be better spent in considering a petition which is not void on its face."[3] In doing so, the Oklahoma Supreme Court took aim at the heart of the protections guaranteed by the United States Constitution under the First and Fourteenth Amendments.

REASON FOR GRANTING THE WRIT

As petitioners have pointed out, the decision by the Oklahoma Supreme Court conflicts with decisions in other jurisdictions. Petitioners' Brief at 18. The effect of the Oklahoma Supreme Court decision is to deprive this court of its role as the final arbiter in construing the Constitution in cases of actual controversy. If state courts prevent debate and a vote on proposed laws based on a purported conflict between the proposal and the federal Constitution, no case or controversy will ever arise and those state courts will become the ultimate, final word on the meaning of the federal Constitution. A recent similar decision by the Nevada Supreme court emphasizes that

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[3] *In re Initiative Petition 349*, 63 Okla. Bar J. 2386, 2393 (Aug. 4, 1992) (No. 76,437), Petitioners' Brief at App. 16A.

the issue posited by the petitioners is a recurring one with nationwide impact and importance. *Stumpf v. Law*, ___ P.2d ___, 1992 WL 235458 (Nev. Sep. 18, 1992). The very foundations of democratic government are threatened by the Oklahoma Supreme court decision. Today's decision trumps political *process* rather than law. In re Initiative Petition 349, supra p. 2398 (Opala, C.J. dissenting) (emphasis by court).

I. THE EXPRESSION ATTENDANT TO THE INITIATIVE PETITION PROCESS, FROM CERTIFICATION THROUGH VOTING, IS CORE POLITICAL SPEECH.

The initiative petition process is "speech" that lies " 'at the core of our electoral process and of the First Amendment freedoms.' " *Meyer v. Grant*, 486 U.S. 414, 425, 108 S.Ct. 1886, 1894 (1988). The phrase "core political speech" has been designated as the form of speech meriting the greatest protection under the First Amendment guarantee of free speech. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("we conclude that the publication . . . lies near the core of the First Amendment . . . 'whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect free discussion of governmental affairs.' "); *First National Bank of Boston v. Bellati*, 435 U.S. 765, 786 (1978) ("especially where, as here, . . . the speech is ultimately related to the process of governing, 'the state may prevail only upon showing a subordinated interest which is compelling . . . ' "); *Buckley v. Valeo*, 424

U.S. 1, 14 (1976) ("the First Amendment affords the broadest protection to . . . political expression . . . ' there is practically universal agreement that a major purpose of the amendment was to protect the free discussion of governmental affairs . . . ' ") *Brown v. Hartloge,* 456 U.S. 45, 53 (1982) ("the free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy – the political process"). Although protection for core political speech does not include a guarantee that the speech will be effective, speech must not be arbitrarily robbed of the potential for effecting change.

Denial of core political speech may be the main reason why the American colonists revolted against Great Britain. As reflected in the subsequently-adopted Constitution, the founding fathers were not upset at the British system of government, nor necessarily in the taxes imposed. Rather, the underlying frustration that fomented the revolution was denying the colonists a right to engage in the debate about how their lives were governed. They may lose that debate and be governed by the same laws that existed before the debate; nonetheless, the right to participate in that debate was felt so keenly that the colonists risked their lives and their savings. The colonists cry was not "no taxation," but rather "no taxation *without representation.*" Further, they enacted as the first amendment to their Constitution, protection for this speech.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both

> as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them discussion affords ordinary, adequate protection against the discrimination of noxious doctrine; the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principal of American government. They recognized the risk to which all human institutions are subject. They knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; hate menaces stable government; the path of safety lies in the opportunity to **discuss freely supposed grievances and proposed remedies;** and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added). Surely, the petition process from the beginning to the vote, is central, core political speech that the First Amendment was designed to protect. "Having decided to confer the right [of initiative], the State was obligated to do so in a manner consistent with the Constitution because . . . this case involves 'core political' speech." *Meyer v. Grant,* 486 U.S., at 420.

The role of the judiciary is not to censor petitions citizen submit to the government, nor to review the petitions for suitable content, nor still yet to protect the citizens from "costly"[4] and "divisive" debate. " 'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ' " *Id.* at 420, citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

"[A] state has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated." *Brown*, 456 U.S. at 52. The effect of the Oklahoma Supreme Court decision is prior censorship of core political speech. Accordingly, this court should grant the petition for *certiorari*.

II. OKLAHOMA LAW, AS CONSTRUED AND APPLIED IN THE DECISION BELOW, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS AS A PRIOR RESTRAINT ON CORE POLITICAL SPEECH.

The fallout from the decision below has already begun. A Nevada court has stopped a nation-wide trend in its tracks by nullifying a term-limit petition, citing the case below as authority. *Stumpf v. Law*, slip. op. at 5. The

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[4] The only cost to the state was adding a few lines to a ballot that already included several other state questions.

evil[5] perpetrated by the decision below must be promptly rectified to prevent continued usurpations by other courts tempted to censor core political speech.

> It is vital to the operation of democratic government that the citizen have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.

A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting). "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the merits of conflicting arguments." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976). Although the First Amendment is not absolute, its protections are greatest when the government actions amount to a "prior restraint." This term has a long history. "The liberty of the press consists in laying no *previous* restraints upon publications," *Blackstone Commentaries,* 4:151 (1770).

> The term 'prior restraint' is used by the courts to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur . . . the point is that engaging in speech activities contrary to a previously-issued administrative or judicial order in fact can, at most, give rise to subsequent punishment. That is, the punishment is administered

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[5] "The evils to be prevented are not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 *Cooley,* Const. Lim. 8th ed. p. 886.

> only after the act of speech itself has already occurred.

Melville B. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment*, § 4.04 (Matthew Bender, 1984). This quotation reflects the proper role of the judiciary which role should not exist until after the speech has been uttered. Here, no judicial role may even have been necessary after the speech had occurred because the proper judicial role would not exist until and unless a law was enacted. This Court has imposed a "heavier" presumption against prior restraint. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

> Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech [after] they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.

Id. at 559. In an earlier opinion, Justice Harlan described actions like that of the Oklahoma Supreme Court: "In the typical censorship situation, material is brought as a matter of course before some administrative authority, who then decides on its propriety. This means that the state establishes an administrative structure, whereby all writings are reviewed before publication." *A Quantity Of Copies Of Books v. Kansas*, 378 U.S. at 222.

> . . . a prior restraint has an immediate and irreversible sanction. If it can be said that a

> threat of criminal or civil sanctions after publications 'chills' speech, prior restraint 'freezes it' at least for the time.

Nebraska Press Association v. Stewart, 427 U.S. 539, 559 (1976).

Although "prior restraints are not unconstitutional *per se*,"[6] prior restraints are only permitted in "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). All of these exceptional cases are concerned with immediate, dramatic and irreversible harm to the public.[7] The core political speech throttled by the Oklahoma Supreme Court posed no possible harm to the public other than that necessarily attendant to vigorous public debate. "The State's fear that voters might make an ill-advised choice does not provide the state with a compelling justification to limiting speech." *Brown v. Hartloge*, 456 U.S. at 60. Political speech is essential to enlightening the people who are to govern themselves in a democracy.

> The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body

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[6] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Prior restraints on speech that have been upheld are those that "sought to control time, place, and circumstance, rather than content." *See Greer v. Spock*, 424 U.S. 828, 866 (1976) (Brennan, J., dissenting). Until just recently, time, place and circumstance were the only pre-balloting roles considered necessary for Oklahoma's constitutional initiative petition process.

[7] The list referenced in *Near* was reiterated in *Nebraska Press Association v. Stewart*, 427 U.S. 539, 590-3 (1976) (Brennan, J., concurring).

> politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.

A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, 75 (1965). The freedom of speech protected by the Constitution functions in "advancing knowledge and discovering truth" in "participating in decision making by all members of society." T. Emerson, *The System of Freedom of Expression*, 6-7 (1970).

Striking State Question 642 from the ballot in Oklahoma has deprived the petition signers the opportunity to debate that which they sought when they placed their names on IP349. The Oklahoma Supreme Court has denied all voters in the State of Oklahoma the opportunity to consider and debate a specific solution to the community's controversy over a particular social issue.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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November 27, 1992

APPENDIX

Ad Hoc Committee of Petition Signers and Voters in Support of a Vote On State Question No. 642

[These voters did not sign Initiative Petition 349.]

1. Appelhans, Victoria
   1419 Leo Road
   Edmond, OK 73034

2. Dunlap, Francis E.
   3900 S. Coachlight Dr.
   Edmond, OK 73013-69

3. Hopkins, Frank J.
   1616 Walnut Cove
   Edmond, OK 73013

4. Istook, Ernest J.
   6113 Inland
   Warr Acres, OK 73132

5. Johns, David W.
   3701 Ridgewood Drive
   Edmond, OK 73013

6. Johns, Mary Beth
   3701 Ridgewood Drive
   Edmond, OK 73013

7. Johns, Nathan
   3701 Ridgewood Drive
   Edmond, OK 73013

8. Johnson, Kay
   3320 Greenwing Court
   Oklahoma City, OK 73120

9. Klabzuba, Robert R.
   3405 Barberry Ct.
   Edmond, OK 73013

10. Loggie, David
7007 Trenton Road
Oklahoma City, OK 73116

11. Loggie, Kathy
7007 Trenton Road
Oklahoma City, OK 73116

12. McCreery, Michael E.
2705 Randolph Road
Edmond, OK 73013

13. McCullough, David
1425 Castlebay
Norman, OK 73071

14. McCullough, Debra
1425 Castlebay
Norman, OK 73071

15. McGinty, Karen
500 West Main
Edmond, OK 73034

16. McGinty, Keith
500 West Main
Edmond, OK 73034

17. Minnis, Martha
2905 Ridgewood Drive
Edmond, OK 73013-8036

18. Minnis, Michael
2905 Ridgewood Drive
Edmond, OK 73013-8036

19. Phillips, Doris
828 S.W. 13th Street
Moore, OK 73160

20. Phillips, William E.
828 S.W. 13th Street
Moore, OK 73160

21. Richardson, James Andrew
707 Morningside Drive
Norman, OK 73071

22. Sparks, Linda J.
1115 S.W. 65th
Oklahoma City, OK 73139

23. Wilson, Harold Matthew
1904 Raquel Rd.
Edmond, OK 73034

[These voters signed the petition]

24. Bowden, II, Philip L.
720 Branchwood Drive
Norman, OK 73072

25. Cross, Tony
1841 Oak Creek Terrace
Edmond, OK 73034

26. Depue, Linda D.
11201 S. Miller Ave.
Oklahoma City, OK 73170

27. Earnest, H. I.
9503 N. Breyont
Oklahoma City, OK 73131

28. Harriss, F. M.
2229 Laneway Circle
Oklahoma City, OK 73159

29. Lasswell, Kara
200 S.W. 32nd
Oklahoma City, OK 73160

30. McGruder, Louise
Route 2, Box 237
Norman, OK 73070

31. Ross, Fred Steven
326 Atterberry
Norman, OK 73071

32. Tackett, Kenneth
13580 Friendship Road
Newalla, OK 74857

33. Whited, Barbara
10718 E. Reno
Midwest City, OK 73130

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No. 92-784

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

Petition For Writ Of Certiorari To The Oklahoma Supreme Court

AMICUS CURIAE BRIEF OF FREE SPEECH ADVOCATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

Free Speech Advocates ("FSA") is a nonprofit legal defense project dedicated to securing the First Amendment rights of individuals and organizations opposing the deliberate destruction of innocent human life. Opponents of speech on controversial issues all too frequently employ judicial or other legal mechanisms in an attempt to silence the controversial speech. Judicial restraint of political speech—either by exclusion of voter initiatives or by censorship of candidate campaigns—is especially noxious because it strikes at the core of the process of representative democracy. FSA submits this amicus brief to urge the Court to review—and overturn—the Oklahoma Supreme Court's throttling of the initiative process in the State of Oklahoma.

SUMMARY OF THE ARGUMENT

The initiative petition process provides a peculiar forum for political expression. From circulation through voting, such process involves the free expression of a democratic people in its purest form. Such process should therefore be jealously safeguarded from judicial interference.

Nonetheless, several jurisdictions, including Oklahoma, have applied their own laws to permit the judiciary to prevent measures proposed by thousands of registered voters from being submitted to a vote of the people based solely upon the content of the proposal. Such rule is based upon an underestimation of the protection afforded core political speech by the United States Constitution and of the inherent value of public debate concerning controversial measures of intense public concern, regardless of

their ultimate enforceability. Even measures which conflict with longstanding constitutional principles should be given access to the marketplace of ideas without judicial interference.

ARGUMENTS IN FAVOR OF ALLOWING THE WRIT

I. INITIATIVE PETITIONS AND FREE SPEECH

Nearly half of the fifty states grant their citizens the right to propose and enact legislation independent of the state legislature. This process serves as a valuable supplement to representative democracy. Elected representatives may be unresponsive to the popular will due to a desire to avoid controversy, for fear of offending influential special interests or simply because the will of the people conflicts with their personal interests.

Because of growing discontent with legislative excess or inaction, the use of initiative petitions has proliferated in recent years. From 1986 to 1990, over 250 citizen initiated petitions were submitted

to a popular vote.[1/] Such figure does not include petitions which were circulated, but never placed on the ballot, either because they were withdrawn, lacked a sufficient number of signatures or were stricken from the ballot by the courts.

By their very nature, initiative petitions often relate to controversial issues of intense interest to the citizenry implicating complex constitutional issues. For example, in this most recent election, voters in various states adopted or rejected initiatives regarding term limits for elected officials, the rights of homosexuals, balanced budget requirements and taxpayer protection.

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[1] *Tentative Report of the TIPS Task Force on Initiatives and Referenda*, (Tort and Insurance Practice Section of the American Bar Association) (submitted August 11, 1992), p. 7.

The entire initiative petition process, including circulation of the petition, campaigning for or against the proposition and the voting itself, constitutes a unique forum for political expression. As noted in the Tentative Report of the TIPS Task Force on Initiatives and Referenda (Tort and Insurance Practice Section of the American Bar Association) submitted August 11, 1992, at 4:

> [Initiative petitions] have an importance to the overall political process and democratic governance that transcends their effect on particular laws. Individuals tend to become engaged in campaigns on ballot propositions in ways that are not found in electoral campaigns for individual officials. The issues that are the subject of the campaign may hold an especially intense interest for certain individuals and entice them into political action. Thus, wholly apart from the benefit they confer as a check on legislative excess or inaction, initiatives and referenda possess the potential to foster a level of

participation that is highly desirable in a democratic state.

Inherent in this process are the most cherished principles of free expression in a democratic state. It is difficult to imagine a more pristine example of political expression deserving of more zealous protection. This Court has therefore held that such process involves "core political speech" and any limitation thereon is subject to "exacting scrutiny."[2/]

II. JUDICIAL INTERFERENCE

Twenty-four jurisdictions authorize initiative petitions. At the time of the decision below by the Oklahoma Supreme Court, seven jurisdictions, including Oklahoma, censored initiatives based upon

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[2] *Meyer v Grant*, 486 U.S. 414 (1988).

their content.[3] Subsequently, the Supreme Court of Nevada, relying in part on the Oklahoma Supreme Court's decision below, reaffirmed its rule permitting presubmission judicial screening of initiatives and struck from the ballot a "term limits" initiative as "palpably unconstitutional."[4] Shortly thereafter, the District of Columbia Court of Appeals, which had previously been silent on the issue, joined the seven jurisdictions holding that pre-election review of constitutional challenges to proposed

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[3] *American Fed. of Labor - Congress v Eu*, 686 P.2d 609 (Cal. 1984); *West Palm Beach Ass'n v Board of City Comm'rs*, 448 So. 2d 1212 (Fla. App. 1984); *Caine v Robbins*, 131 P.2d 516 (Nev. 1942); *Lips v Meier*, 336 N.W.2d 346 (N.D. 1983); *State v Murray*, 394 P.2d 761 (Mont. 1964); *White v Welling*, 57 P.2d 703 (Utah 1936); *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3 (Okla. 1975).

[4] *Stumpf v Lau*, No. 23517, 1992 WL 235458 (Nev. Sept. 18, 1992).

initiatives was permitted.[5/] Thus, the trend of recent cases has been in favor of permitting judicial encroachment upon the initiative process before the voters have a chance to express themselves on the proposed measure.

Any enactment, whether initiated by citizens or their elected representatives, must ultimately withstand legal challenges to its enforceability, whether constitutional or otherwise. The issue is not whether the proposed initiative in this case or any other would be constitutional if adopted. No challenge is posed to the ultimate authority of the United States Constitution as construed by this Court. The sole issue is whether the First and Fourteenth Amendments prohibit judicial interference with the right of the

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[5] *Hessey v Burden*, Nos. 92-CIV-126, 92-CIV-172, 1992 WL 312830 (D.C. App. Oct. 27, 1992).

citizens to express themselves regarding an initiative proposed by thousands of their fellow citizens.

III. EXACTING SCRUTINY

A review of the majority opinion in the case below offers little comfort that its content-based prior restraint of core political speech can be upheld under the applicable exacting scrutiny standard. The Oklahoma Supreme Court attempted to justify its silencing of public debate by characterizing a vote of the people as "useless."[6]

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[6]Interestingly, the same concern over useless acts could be equally applied to the ordinary legislative process. A considerable amount of time effort and state resources are invested in the enactment of a bill into law. After a bill is introduced, it is studied, hearings are held, representatives are lobbied by interested parties, constituents are consulted and the measure is debated before it is finally approved. If conservation of resources is the preeminent goal, a bill introduced in the legislature should be immediately submitted to the highest court of the state for review of its validity before any more time and resources are wasted on a "useless" process.

It is submitted that core political speech does not have to be demonstrably useful in order to be accorded First Amendment protection. Instead, it is intrinsically valued without regard to its content. However, the usefulness of a campaign and vote on a measure proposed by thousands of citizens is easily defended, even if it is assumed for the sake of example that the measure, if approved, would be ultimately found by this Court to be unconstitutional. The campaign and vote stimulate focused statewide debate aimed at building a popular consensus on the specific issue. Even if the measure as written is unenforceable, the campaign and vote on such measure are powerful tools for either promoting or resisting political change. Elected state representatives can be motivated to enact or oppose less restrictive legislation.

Impetus towards amending the Constitution to remove constitutional impediments may be enhanced or diminished. Speech advocating changing the United States Constitution and its construction is itself jealously protected from judicial censorship by the First Amendment.

The hypothetical posed by the majority opinion is a useful illustration. Justice Kauger stated:

> Judicial intervention to interdict a hypothetical state constitutional amendment prohibiting the free exercise of religion would 'limit' proponents 'core speech' activities; however, no one would question the legitimacy of such a limitation.

In re Initiative Petition 349, State Question 642, 63 Okla. B.J. 2386, 2391 (August 4, 1992) (No. 76,437).

On the contrary, even measures which challenge longstanding traditional constitutional principles should be debated and voted upon if they are

proposed by a significant segment of the state's voters, regardless of the validity of the proposed enactment. The ultimate unenforceability of the petition is an inadequate basis for silencing the debate over its merits. If a sufficient number of voters were to propose abolition of the right to free exercise of religion, public expression on the issue should be encouraged, not silenced. In the course of such discussion, statewide attention would be focused upon the reasons for and against protecting individuals in the free and unfettered exercise of their religious beliefs. Such a debate and vote can only be considered healthy exercises for a democratic people, rather than "ultimately meaningless acts in an elaborate charade." 63 Okla. B.J. at 2392.

CONCLUSION

The protection afforded the right of the people to express themselves by proposing or opposing legislation should be coextensive with their right to express themselves similarly in any other arena. The issue is whether citizens of this nation have the right to publicly endorse any legislation without regard to its constitutionality. It is therefore submitted that judicial intervention to strike initiative petitions from the ballot on the basis of anticipated constitutional invalidity is itself a constitutionally impermissible content-based prior restraint of core political speech.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 14 1992
OFFICE OF THE CLERK

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In The

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Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

STATE QUESTION NO. 642

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR CERTAIN OKLAHOMA STATE SENATORS AND STATE REPRESENTATIVES, OKLAHOMA LEGISLATORS IN SUPPORT OF A VOTE ON STATE QUESTION 642, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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COMES NOW Oklahoma State Senators Howard H. Hendrick (Rep. Dist. 52, Bethany), Donald J. Rubottom (Rep. Dist. 35, Tulsa), Trish Weedn (Dem. Dist. 15, Purcell), Jerry L. Smith (Rep. Dist. 39, Tulsa), Jerry T. Pierce (Rep. Dist. 29, Bartlesville), Lewis Calvin Long, Jr. (Dem. Dist. 57, Tulsa), and Oklahoma State Representatives Gary C. Bastin (Dem. Dist. 94, Del City), Carolyn S. Coleman (Rep. Dist. 53, Moore), Mark T. Seikel (Dem. Dist. 96, Harrah), William R. Paulk (Dem. Dist. 92, Okla. City), and Joan Greenwood (Rep. Dist. 54, Moore), legislators in support of a vote on State Question No. 642, and submit the following brief pursuant to Sup.Ct.R. 34.

CONSENT TO FILING

Both parties have consented to the filing of this brief. Letters memorializing this consent will be simultaneously filed with this brief.

INTEREST OF *AMICI CURIAE*

Amici Curiae are members of the Oklahoma State legislature. In general, *amici's* interest is that the opinion below has improperly interfered with the exercise of legislative powers by censoring core political speech. Although this interference is with the initiative legislative process, the rationale for the Oklahoma Supreme Court decision below striking down a proposed law applies with equal force to the representative legislative process. The majority implied as much:

> [W]e are required to find the initiative petition unconstitutional. We also find that an examination of the constitutionality of the initiative petition is necessary, both to avoid misleading citizens about the legal effect of the proposition upon which they may vote, and to avoid a costly election which would ultimately be an exercise in futility. [Nevertheless this ruling does not prohibit the circulation of a proper initiative petition **or of legislation which passes constitutional muster.**]

In Re: Initiative Petition No. 349, 838 P.2d 1, 3, 61 U.S.L.W. 2102 (Okla. 1992).[1] The emphasized language implies that the judiciary claims the power to prohibit the legislature from voting on proposed legislation submitted by state legislators that fails to pass the Oklahoma Supreme Court's "constitutional muster." Although this implication is tempered by subsequent distinctions,[2] the threatened usurpation is not specifically rejected and the distinctions are not material. Although the initiative and representative legislative processes are certainly different, the rationale for the judicial interference is the same, to-wit: those who legislate – whether the people or their representatives – should not be allowed to waste their time in divisive arguments considering and voting on

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[1] A copy of the opinion is reprinted in Petitioners' Appendix at pages 1a to 52a.

[2] "Many of the hurdles built into our legislative structure do not apply to initiatives and referendum: namely, passage by both houses, legislative committee consideration, and the availability of a gubernatorial veto. These are two very different processes and the proponent's efforts to confuse them are misplaced." *In Re Initiative Petition No. 349*, 838 P.2d at 11.

proposed laws that conflict with the federal constitution. When the unconstitutionality of proposed legislation is "manifest," it "is both appropriate and necessary to avoid a costly and useless" vote for the judiciary to strike the proposal from consideration by the legislature. *See Id.* at 2-3.

In considering Initiative Petition No. 349 ("IP349"), the majority of the Oklahoma Supreme Court behaved not as impartial jurists, but as a politicized group imposing their will to control public debate. The *amici*, as legislators, may not limit core political speech directly and the judiciary may not do so indirectly by misconstruing state laws to violate rights protected by the federal constitution. States and their courts may not opt out from the protections of the First Amendment. The opinion below is a threat to the speech and debate indispensable to the legislative powers constitutionally reserved[3] by the citizens of Oklahoma and delegated, in part, to elected representatives like the *amici*.

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[3] "All political power is inherent in the people . . . " Okla. Const. art. II, § 1. "The people have the right . . . to apply to those invested with the powers of government for redress of grievances by petition . . . " Id. at § 3. "No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right." Id. at § 4. "The Legislative authority of the State shall be vested in a Legislature . . . but the people reserve to themselves the power to propose laws and amendments to the Constitution . . . " Id. at art. V. § 1.

STATEMENT OF THE CASE

On June 29, 1990, petitioners filed an initiative petition that was assigned number 349. The text of the proposed law became State Question 642. Under Oklahoma law, petitioners had 90 days to obtain signatures equal to or greater than 8% of the legal voters who cast ballots "at the last general election for the State office receiving the highest number of votes at such election." Okla. Const. art. V, § 2. On September 27, copies of IP349 with 106,537 signatures affixed were filed with the Oklahoma Secretary of State.

On December 17, the Oklahoma Supreme Court entered an order directing publication of notice that IP349 had been filed and that protests must be received within 10 days. The notice was published December 26 and on December 31 the respondents, Nancy Feldman and Kim Little, protested the legal sufficiency of the petition, *inter alia*, because "as drafted, [it] violates the Constitution of the United States."[4]

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[4] Pet. App. at 99a, para. 10. Under this particular segment of their protest, Feldman and Little list 9 separate alleged constitutional infirmities. This laundry list exemplifies the burdens that can be imposed by protest of legislative proposals. Without an actual factual controversy, speculation about how a proposed law might impinge on an interest are virtually limitless and unfocused. *See e.g. In Re Initiative Petition No. 349*, 838 P.2d at 21-23 (Opala, C.J., dissenting) ("The concept of standing focuses on whether the party invoking the court's jurisdiction has a legally cognizable interest in the outcome of the controversy. A party seeking relief must show actual or threatened injury of some kind. The inquiry is whether *the party has in fact suffered injury to a legally protected interest within the contemplation of statutory or constitutional provisions.*") (emphasis in original, footnotes omitted).

However, 448 days later, on March 23, 1992, Feldman and Little filed a brief stating that the "[T]he protestants hereby withdraw their federal and state constitutional claims." Thereafter, "an opinion approving the initiative petition [IP349] for submission to a vote of the people . . . [was] prepared and considered" by the Oklahoma Supreme Court "and was in the process of being readied for publication." Pet. App. at 94a. However, this opinion was never filed nor published because on July 14, the acting vice chief justice, *sua sponte*,[5] entered an order "in the interest of fairness"[6] on a 5-to-4 vote directing the "proponents, the protestants, and the Attorney General"[7] "to submit simultaneous briefs . . . within ten (10) days . . . addressing *Planned Parenthood* [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 120 L.Ed.2nd 647 (1992)] and its impact on the constitutionality of the proposed ballot title and **the substance** of" IP349. Pet. App. at 89a (emphasis added).

When the Oklahoma Supreme Court ignored the petitioners' suggestion that the court had no jurisdiction to enter the July 14 order because all federal and state

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[5] No party requested this order ("neither the proponents nor the protestants have asked us to address . . . [*Casey's*] impact on the important constitutional issues." Pet.App. at 94a).

[6] *In Re Initiative Petition No. 349*, 838 P.2d at 3.

[7] The Attorney General has no statutory role in protests to the legal sufficiency of an initiative petition. "Neither the State, nor any agency, officer, or employee was a party in the case below." *State of Oklahoma's Motion for Leave to Intervene*, p. 3, para. 3. *See also*, "Brief in Opposition of Intervenor, the State of Oklahoma," p. 18. The petitioners' objection (Pet. App. at 79a) to this invitation was denied by the Oklahoma Supreme Court in a separate order filed August 14, 1992.

constitutional claims had been withdrawn and the protest period had expired, simultaneous briefs were filed July 24 by petitioners, by Feldman and Little, by other protestants who had only challenged the numerical sufficiency, by the Attorney General, as well as by numerous *amici curiae* who had not previously appeared.[8]

Eleven days later, the Oklahoma Supreme Court entered a 5-4 opinion[9] that State Question 642 "could not withstand a constitutional challenge" and ordered it "stricken from the ballot" to protect the people from a "costly, fruitless and useless election."[10]

SUMMARY OF ARGUMENT

The implications from how the Oklahoma Supreme Court decided the case below are clear. The majority simply abandoned their judicial functions to egregiously interfere with political speech necessarily attendant to the legislative process.[11] The "decision *trumps political process*

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[8] The suddenly appearing *amici* included *federal* legislators (a Senator, two Representatives, and a former Representative) and law professors from various states who were represented by New York attorneys.

[9] The four dissenters were the same as those dissenting from the July 14 order. Although several dissenting opinions were filed, the gist of their argument was that the issue decided was not justiciable.

[10] *In Re Initiative Petition No. 349*, 838 P.2d at 12.

[11] "The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; . . . neither shall exercise the powers properly belonging to either of the other." Okla. Const. art IV, § 1.

rather than law." In Re Initiative Petition No. 349, 838 P.2d at 27 (Opala, C.J., dissenting) emphasis in original). A legislative initiative had been on file for nearly two years,[12] when the majority seized an opportunity to cloak their judicial invasion of core political speech with a patina of legitimacy. Because the only federal constitutional challenge had already been withdrawn, no issue about the constitutionality of the proposed law was pending when the Oklahoma Supreme Court acted on August 4th.[13] The purported reason for the *sua sponte* order on July 14 and the putative basis for the opinion promptly issued 11 days later on August 4th was the *Casey* decision. *Casey* was hardly justification for a renewed look at the federal constitutionality of State Question 642. *Casey* did not expand a woman's right to an abortion, but rather contracted the right by overruling prior decisions. *See Casey,* 112 S.Ct. at 2822 ("The conclusions reached by a majority . . . require us to OVERRULE in part some of the court's past decisions. . . . "). If State Question 642 was inconsistent with the federal constitution after *Casey,* it certainly was so immediately before *Casey.*

Whatever the real motives of the majority of the Oklahoma Supreme Court, their expressed reasons for

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[12] At the end of this period, the panel changed. Justice John B. Doolin resigned May 1, 1992. Joseph M. Watt was named to the vacancy May 19 and was sworn in June 1, 1992. Justice Watt voted with the majority.

[13] "It appears that all parties in this case want the initiative petition submitted to a vote of the people only to be thwarted by this court's *sua sponte* injection of the constitutional issues." *In Re Initiative Petition No. 349,* 838 P.2d at 14 (Hodges, V.J., concurring in part, dissenting in part, with whom Hargrave, J., joins).

interfering with the legislative process are direct attacks on core political speech, a prior restraint thereon, and hence violate protections guaranteed by the United States Constitution under the First and Fourteenth Amendments.

ARGUMENT

As the dissenters have pointed out, the Oklahoma Supreme Court decided an issue without a pending case or controversy.[14] No party had standing to raise any constitutional challenge;[15] for that matter, no party was pursuing such a challenge. In *sua sponte* injecting itself into the legislative process, the Oklahoma Supreme Court has seriously abused the judicial power, undermined the "Legislative authority of the State," and abridged the liberties of the citizens of Oklahoma. However, just as importantly, the opinion has resulted in a prior restraint on core political speech. This court should grant the writ

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[14] E.g., "The issue of the constitutionality of the measure proposed by the initiative petition was not initially briefed by the parties. In fact, protestants withdrew their constitutional claims. Thus, the issue is not properly before the court and should not be the determining factor in denying the people their right to vote." *In Re Initiative Petition No. 349*, 838 P.2d at 14 (Hodges, V.C.J., dissenting).

[15] A protest to the legal sufficiency of an initiative petition must "be filed within ten (10) days after publication [of notice]. . . . No objection to the sufficiency shall be considered unless the same shall have been made and filed as provided herein." Okla. Stat. tit. 34, § 8 (1991).

and give summary relief for this serious breach of fundamental rights protected by the First and Fourteenth Amendments.

The power to control legislative speech and debate is the power to legislate. This fundamental axiom was clearly understood by the Founding Fathers, who provided that federal senators and representatives "shall not be questioned in any other place" "for any speech or debate in either house." U.S. Const., art. I, § 6. Oklahoma has adopted a *verbatim* protection of legislative speech and debate. Okla. Const., art. V, § 22. In fact, the common-law meaning of the "freedom of speech" is that it "referred not to a civil right, but to a parliamentary privilege." Forest McDonald, "*Novus Ordo Seculorum*," p. 46 (Univ. Press of Kan., 1985). What could be more central to the speech and debate about legislation than the substance of the proposed law? In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), this court quoted with approval the following excerpt from Chief Justice Parsons' opinion in *Coffin v. Coffin*, 4 Mass. 1 (1808).

> These privileges [legislative speech and debate] are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the whole design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written

> report, and **to every other act resulting from the nature and in the execution of the office.**

Kilbourn v. Thompson, 103 U.S. at 203 (emphasis added). Mr. Justice Story is quoted as saying, " 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual.' " *Id.* at 204. If the judges can censor the content of legislative proposals, they have usurped absolute control over legislative speech and debate.

Respondents have cited language[16] from the Oklahoma Bill of Rights as authority for the proposition that Oklahoma has constitutionally provided for presubmission review of initiative petitions by the judiciary. Respondents have misconstrued the intent of the language quoted. The cited phrase ("be not repugnant to the Constitution of the United States") is a mere reiteration that the federal Constitution "is the supreme law of the land." *See* Okla. Const., art. I, § 1. The limiting language is not repeated in the constitutional provision authorizing the initiative process.

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people

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[16] "All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: **Provided, such change be not repubnant to the Constitution of the United States.**" Okla. Const. art. II, § 1. (emphasized language cited by Respondents) "Brief for Respondents Feldman and Little in Opposition," p. 10.

> reserve to themselves the power **to propose laws** and amendments to the Constitution, **and to enact or reject the same at the polls** independent of the legislature, and also reserve power at their own option to approve or reject at the polls any action of the Legislature.

Id. at art. V, § 1 (emphasis added). The petitioners' argument, or a logical extension of it, is why the *amici* have filed this brief. Although the constitutional provision authorizing an initiative petition does not contain any proviso about the federal constitution, similar restrictive language is included in a section discussing the legislative powers of the Senate and House.

> The reservation of powers in the initiative and referendum in this article shall not deprive the legislature of the right to repeal any law, propose or pass any measure, **which may be consistent with** the constitution of the state and the **Constitution of the United States.**

Id. at art. V, § 7 (emphasis added). Consequently, if respondent's interpretation of art. II, § 1 gives the Oklahoma Supreme Court the authority to judicially veto proposed initiative petitions, art. V, § 7 would similarly give the Oklahoma Supreme Court the authority to judicially veto proposed legislation pending before the State Legislature. This portending invasion of *amici's* core political speech dramatizes the need to respond to the Oklahoma Supreme Court's breach of the First Amendment.

A judiciary "veto" of proposed legislation is a usurpation not easily reined. Although Oklahoma authorizes impeachment proceedings and periodic ballot retention votes, the only effective limitation on the judiciary is

each jurist's own recognition of the proper judicial function. Without this self-restraint, the people become subject to the whims of an judicial oligarchy answerable to no one.[17] The question is essentially about law. When the legislature, the executive or the judiciary, take action that exceeds the powers granted them, they are violating law, no matter how worthy the goal. Here, the goal of protecting people from "useless debate" is hardly worthy, but rather is paternalistic arrogance.[18] These usurpations inevitably undermine respect for the judiciary and for law.

Fortunately, citizens of Oklahoma have another means of reminding the Oklahoma judiciary of their proper function, to-wit: this court can restore the speech and debate rights guaranteed by the federal Constitution's First and Fourteenth Amendments. Oklahoma's dissenting Chief Justice listed a number of fundamental legal principles (prudential rule, standing, primary jurisdiction, *etc.*) violated by the majority decision. *See In Re Initiative Petition No. 349,* 838 P.2d at 21-22. These principles are not idle technicalities, but rather prudential rules giving form to the boundaries of judicial authority. The proper judicial role is to construe *law,* not to censor *proposed law.* "Judges serve as stewards of constitutional

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[17] *Cf.* "The United States shall guarantee to every stat in this union a republican form of government. . . . " U.S. Const., art. IV, § 4.

[18] Respondents express this same smug disdain for Oklahoma voters. *See, e.g.,* "[invalidation of presubmission review] would amount to a requirement that states stand idly by as a misguided electorate chooses to violate the constitutional rights of their fellow citizens." Respondent's Brief at 11.

purity *in law,* but *do not also function as government agents enforcing constitutional orthodoxy upon the process of law-making." Id.* at 19. As one commentator has remarked on the federal Constitution:

> The Executive and Legislative authorities of the United States have no powers, except as such are expressly conferred on them by the Constitution itself; and, on the other hand, the several states are forbidden by the Constitution to do certain acts and pass certain laws. What then is to be done if these limitations of power are transgressed by any state, or by the United States? The duty of annulling such usurpations is confided by the third article of the Constitution to the Supreme Court, and to such inferior courts as Congress may, from time to time, ordain and establish. But this remarkable power is capable only of indirect exercise; it is called into activity by 'cases,' by actual controversies, to which individuals, or states, or the United States, are parties. The point of unconstitutionality is raised by the arguments in such controversy; the decision of the court follows the view which it takes of the Constitution. **A declaration of unconstitutionality, not provoked by a definite dispute, is unknown to the Supreme Court.**

Henry Sumner Maine, "Popular Government," pp. 216-217 (1976) (emphasis added, footnotes omitted). While this statement may be true of the United States Supreme Court, it most assuredly does not accurately describe the majority of the Oklahoma Supreme Court who filed the opinion below. Their decision was an "excercise of judicial power [that] interferes with the exercise of the political power of the people, acting as our

legislative branch of government." *In Re Initiative Petition No. 349*, 838 P.2d at 15, (Wilson, J., dissenting in part). Like dissenting Justice Alma Wilson, amici "refuse to join in this flagrant encroachment upon the people's legislative powers." *Id.* The First and Fourteenth Amendments protect the public from a judiciary that would use the power to invalidate law "to create a form of court-impressed censorship purging from open and public debate and excising from the marketplace of available ideas *novel* policy solutions that might meet with current judicial disfavor." *Id.* at 19 (Opala, C.J., dissenting). *Amici* join with Chief Justice Opala in declaring that: "Debates on constitutional issues are not judicially bannable from public fora nor are they outside the protection accorded political speech. Judicial pre-enactment scrutiny of proposed legislation for constitutional flaws raises an impermissible restraint on the free exercise of political speech." *Id.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1992

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC. and FRED W. SELLERS, JR.,

Petitioners,

—v.—

NANCY FELDMAN, KIM LITTLE, JANET M. TALIAFERRO, PAM FLEISCHAKER and ANDREW TEVINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF OF RESPONDENTS TALIAFERRO, FLEISCHAKER AND TEVINGTON IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment precludes the Oklahoma Supreme Court, pursuant to art. II, § 1 of the Oklahoma Constitution, from removing a concededly unconstitutional initiative from the ballot prior to a public vote?

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Respondents Janet Taliaferro, Pam Fleischaker and Andrew Tevington oppose the Petition for a Writ of Certiorari filed on October 29, 1992 by the Oklahoma Coalition to Restrict Abortion and Fred Sellers, Jr. The Petition seeks review of a decision of the Oklahoma Supreme Court that ordered the removal from the ballot of an abortion initiative because it was unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). The opinion of the Oklahoma Supreme Court, issued August 4, 1992, is reported at 838 P.2d 1 (Okla. 1992).

COUNTERSTATEMENT OF THE CASE

Initiative petition No. 349 (hereinafter "the abortion initiative") would impose a criminal ban on virtually all abortions in Oklahoma.[1] On July 14, 1992, following this Court's opinion in *Planned Parenthood v. Casey*, which found that a state law banning abortion violates a woman's federal constitutional right of privacy, *see id.*, 112 S. Ct. at

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[1] The measure criminalizes all abortions except in certain narrow circumstances: (1) where "necessary to save the life of the female or to avoid a grave impairment of the female's physical or mental health," 113a; (2) in cases of rape reported within 30 days of the incident or incest reported prior to the abortion, 114a-15a; or (3) in cases where the "unborn child would be born with a grave physical or mental defect." 114a. In cases falling under (1) and (3), the qualifying condition must be certified by a physician who "may not perform or assist in the performance of the abortion, and shall not have any pecuniary interest, either direct or indirect, in the performance of the abortion." 114a-115a. All persons performing or intentionally or knowingly aiding in the performance of abortions not falling within these narrow exceptions are to be punished by a minimum of four years imprisonment and clinics are to be punished by a fine ranging from $10,000 to $100,000. 113a. The measure would take effect immediately on passage, 117a, eliminating any opportunity for the orderly determination of its constitutionality before it is enforced.

2804, the Oklahoma Supreme Court, *sua sponte*, ordered all parties to brief the constitutionality of the abortion initiative under *Casey*.[2] On August 4, 1992, pursuant to art. II, § 1 of the Oklahoma Constitution, which prohibits initiatives that are "repugnant to the United States Constitution," the Oklahoma Supreme Court removed the abortion ban from the ballot. In response, petitioners filed their Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

Although they fully concede that the proposed ballot measure is unconstitutional under this Court's decision in *Casey*,[3] petitioners nevertheless insist that they have a First Amendment right to force Oklahoma to hold a straw poll on the abortion ban. This claim is groundless and without merit. Just last Term, this Court held that there is no First Amendment right to use the election process as a forum for political expression. *Burdick v. Takushi*, 112 S. Ct. 2059

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[2] In addition to proponents and protestants, the Oklahoma Supreme Court invited the Attorney General of Oklahoma to participate in the case. After petitioners' motion to disqualify the Attorney General, *see* Pet. at 7 n.2, was denied, the Attorney General submitted a brief supporting the removal of the initiative from the ballot. Petitioners' attack on the denial of their motion, *see id.* ("the Attorney General's role . . . is limited to determining whether the proposed ballot title is in legal form and in harmony with the law") is improper. No citation is needed for the proposition that a state supreme court may solicit briefs from any source it believes will assist its decision. Respondents Taliaferro, Fleischaker and Tevington support the granting of the Attorney General's Motion to Intervene and concur in the argument set forth in her Brief in Opposition filed with this Court.

[3] Pet. at 26; *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3399 (U.S. Nov. 30, 1992) (No. 92-104); *Sojourner T v. Edwards*, 974 F.2d 27 (5th Cir. 1992).

(1992). In addition, federal courts of appeals are unanimous in affording state courts broad discretion to remove unconstitutional initiatives from the ballot. *Gibson v. Firestone*, 741 F.2d 1268 (11th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Henry v. Connolly*, 910 F.2d 1000 (1st Cir. 1990). Oklahoma's procedure allowing judicial review of proposed initiatives prior to a vote is precisely the type of matter that belongs within the sound discretion of a state court and which this Court should neither disturb nor review.

Moreover, if accepted, petitioners' argument would condemn as a violation of the First Amendment any court ruling or administrative action invalidating an initiative petition and would thereby undermine the central role of the judiciary as the ultimate arbiter of the constitutionality of legislation, a matter of settled law since this Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Petitioners have shown no conflict between the decision of the Oklahoma Supreme Court and that of either any other state court of last resort or United States Court of Appeals, *see* Sup. Ct. R. 10.1(b); nor have they shown that the court below decided an issue of law that "has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). Thus, all the Rule 10 factors that this Court considers in deciding whether to grant review weigh heavily against granting the writ.

I. REFUSING TO PLACE AN UNCONSTITUTIONAL INITIATIVE ON THE BALLOT DOES NOT ABRIDGE PETITIONERS' FIRST AMENDMENT RIGHT TO ENGAGE IN POLITICAL SPEECH.

Without authority, petitioners make the specious claim that art. II, § 1 of the Oklahoma Constitution, which authorizes state courts to remove from the ballot those initiative measures that are "repugnant to the federal constitution,"[4] violates their First Amendment right to express their opinion through voting. But in *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), this court recently rejected a challenge to Hawaii's ban on write-in ballots, holding that the ban did not "discriminate[] against [the voter] based on the content of the message he seeks to convey through his vote." *Id.* at 2065. The Court held that "[a]ttributing to elections a . . . generalized expressive function would undermine the ability of States to operate elections fairly and efficiently," *id.* at 2066, and that nothing in the First Amendment requires that "the State record, count and publish individual protests against the election system . . . ." *Id.* at 2067; *see also id.* at 2069 (Kennedy, J., dissenting) ("[T]he purpose of casting, counting and recording votes is to elect public officials, not to serve as a general forum for political expression"). Like the prohibition on write-in votes upheld in *Burdick*, Oklahoma's constitutional provision restricting ballot access

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[4] This provision of the Oklahoma Constitution has been interpreted "in an unbroken chain of decisional law" to require "a determination on a constitutional question as to the legality of a measure proposed to be enacted into law by the people" if reaching the issue may prevent the holding of a costly and unnecessary election. 10a. Petitioners' attack on this interpretation, *see* Pet. at 13, is beyond the jurisdiction of this Court because it is wholly a question of state law. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

to constitutional measures falls within the category of "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Id.* at 2066. Thus, far from being at odds with a decision of this Court, the decision of the Oklahoma Supreme Court is completely consistent with this Court's decision in *Burdick*.

Meyer v. Grant, 486 U.S. 414 (1988), upon which petitioners' entire argument depends, is not to the contrary. Nothing in *Meyer* supports the view that there is a First Amendment right to cast a ballot on an initiative that fails to meet a state's legal requirements for placement on the ballot. Rather, *Meyer* holds that state procedures for persuading voters to support an initiative petition may not impose burdensome restrictions on the advocacy of the initiative. It is undisputed that if Oklahoma had sought to restrict discussion of the initiative by penalizing speech about the abortion ban, it too would have overstepped constitutional bounds. But here, the Oklahoma Supreme Court has not restricted or prohibited any discussion about the unconstitutional measure; it has simply refused to place it on the ballot for a vote. Prohibiting the *enactment* of unconstitutional legislation is not the same as prohibiting the *advocacy* of unconstitutional legislation. Petitioners are no more entitled to have Oklahoma conduct a vote on their proposal as a vehicle for expression about the abortion issue than any other Oklahoman is entitled to use the voting booth as a soapbox for the advancement of his or her own agenda. As this Court held in *Burdick*, elections do not have a "generalized expressive function." 112 S. Ct. at 2066.

The United States Courts of Appeals are unanimous in according broad deference to state courts to remove initiative measures from the ballot prior to a vote. In *Gibson v. Firestone*, 741 F.2d 1268 (11th Cir. 1984), *cert.*

denied, 469 U.S. 1229 (1985), the Court of Appeals for the Eleventh Circuit refused to recertify a ballot measure that the Florida Supreme Court had removed from the ballot on constitutional grounds. *See Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). In words that apply directly to this case, the *Gibson* court held:

> Clearly, appellants can claim no constitutionally-protected right to place issues before the Florida electorate; any opportunity to do so must be subject to compliance with state constitutional requirements.

741 F.2d at 1273 (footnote omitted). Similarly, in *Henry v. Connolly*, 910 F.2d 1000 (1st Cir. 1990), the Court of Appeals for the First Circuit refused to place an initiative on the ballot after it had been removed by the Massachusetts Supreme Judicial Court on state constitutional grounds. In keeping with *Meyer*, the court recognized that a state must "administer ballot access . . . in a manner comporting with the demands of the federal Constitution." *Henry*, 910 F.2d at 1004. The court added:

> Nevertheless, it is important to remember that the federal nose cannot be poked into the state's tent unless some constitutional infirmity exists. So long as the constitutional minimum is met, our task ends. It is not for a federal court to say that a constitutionally adequate procedural arrangement,

> duly adopted by the Commonwealth, is worse, or less fair, than some alternative formulation.

Id.[5]

This Court's decision in *Burdick* refusing to recognize a First Amendment right to express one's opinion through voting, as well as the courts of appeals decisions giving broad deference to states to adopt reasonable election rules, are fully supported by important state interests. At least since *Storer v. Brown*, 415 U.S. 724 (1974), this Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 730. Equally important is the state's strong interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Preventing a vote on an unconstitutional measure avoids the

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[5] Federal courts, however, are divided on whether they themselves may take the extreme step of blocking ballot initiatives approved by state law. *Compare Ranjel v. City of Lansing*, 417 F.2d 321, 325 (6th Cir. 1969) (refusing to enjoin state initiative, preferring to "allow[] the election to proceed and rule[] on the validity of the measure after its passage."), *cert. denied*, 397 U.S. 980 (1970), *and New Progressive Party v. Hernandez Colon*, 779 F. Supp. 646, 662 (D.P.R. 1991) (refusing to enjoin ballot measure where "unfairness does not rise to the level of a federal constitutional deprivation"), *with Otey v. Common Council of the City of Milwaukee*, 281 F. Supp. 264, 273 (E.D. Wis. 1968) (enjoining municipal referendum that "would significantly involve the City in private discrimination and unquestionably encourage such discrimination"); *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990) (holding unconstitutional a statute banning virtually all abortions on Guam and therefore finding the initiative authorized by the statute itself "moot"), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3399 (U.S. Nov. 30, 1992) (No. 92-104).

misunderstandings that inevitably occur when unconstitutional initiatives are approved by the voters only to be rapidly enjoined by a federal or state court. Finally, removal of an unconstitutional initiative proposal from the ballot avoids wasting public funds on a useless election.[6]

The state constitutional rule that authorizes the Oklahoma Supreme Court to remove initiatives from the ballot is also an important procedural safeguard that guarantees the constitutionality of enactments proposed by initiative. In most states, laws enacted by the legislature must pass through the more cautious and deliberative legislative process: proposals receive committee study, review at public hearings, floor debate, as well as bicameral consideration by legislators, and review by the governor, all of whom have taken an oath of office to uphold the state and federal constitutions. *See* William J. Keefe & Morris S. Ogul, *The American Legislative Process: Congress and the States* (1985); Samuel Kirkpatrick, *The Legislative Process in Oklahoma* (1978). In many states, any member may request, pursuant to

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[6] For example, in *Stumpf v. Lau*, No. 23517, 1992 WL 235458 (Nev. Sept. 18, 1992), the Nevada Supreme Court found that an initiative which sought to place limits on the number of terms a United States Representative or Senator from Nevada may serve violated the qualifications clauses of Article I of the United States Constitution. Recognizing that the initiative was not designed to change the law or constitution, but merely to let the people "express themselves" in the manner of a public opinion poll on the issue, the court concluded that:

> [t]he question here cannot be implemented in a constitutional manner, and we envision no public utility in burdening an already strapped public fisc with the expense that would inevitably be incurred by placing a meaningless question on the ballot, conducting the election, and tallying the votes.

Id. at *3.

House or Senate rules, that the *entire* body vote on the constitutionality of the measure. Furthermore, legislative measures may be amended before passage, whereas ballot proposals are in their final form when submitted to the voters. In effect, pre-election judicial review serves as an important substitute for the procedural safeguards of the ordinary legislative process.[7] Contrary to petitioners' suggestion that this review fails to respect the rights of voters, timely judicial consideration of constitutional deficiencies in ballot proposals is an effective method of voter protection. By guaranteeing that initiative measures have been properly proposed and are constitutional, courts ensure that the voters' decisions are final and may be implemented.

Indeed, if petitioners possess an unlimited First Amendment right to force a vote on an unconstitutional initiative, state courts and state officials would be prohibited from regulating the initiative process in most, if not all, instances. Many state courts routinely conduct substantive pre-election judicial review.[8] Similarly, state

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[7] The procedures of the ordinary legislative process also safeguard the rights of political minorities. The Federalist No. 10 (James Madison). Pre-election judicial review is therefore also essential to prevent the diminishment of these rights through the peculiar dynamics of the initiative process.

[8] *See, e.g., Whitson v. Anchorage*, 608 P.2d 759 (Alaska 1980) (tax initiative removed from the ballot as unconstitutional under Alaska Const. art. X, § 11); *Legislature of State of Cal. v. Deukmejian*, 669 P.2d 17 (Cal. 1983) (initiative that violates state constitutional provision specifying that redistricting may occur only once within a ten year period following a federal census struck from ballot); *Hessey v. Burden*, No. 92-CV-126, 1992 WL 312830 (D.C. Oct. 27, 1992) (Superior Court may exercise its discretion to evaluate constitutional claims before an election when it is acting within its general equity jurisdiction);

(continued...)

courts, Attorneys General and Secretaries of State routinely review both ballot titles and questions and the manner in which petition signatures are collected.[9] Under petitioners' novel and unsupported theory, these routine administrative actions -- even the removal of a ballot measure for failure to obtain the required number of signatures -- would violate the First Amendment.

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[8](...continued)
Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990) (affirmance of trial court injunction against an initiative that did not comply with the single subject requirement of the Missouri Constitution); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984) (initiative ordering legislature to apply to Congress to call a federal constitutional convention to consider a federal balanced budget amendment removed from ballot on state and federal constitutional grounds); *City of Newark v. Benjamin*, 364 A.2d 563, 568 (N.J. Super. Ct. 1976) (declaratory judgment issued against initiative concerning the police review board, holding that "[i]f an ordinance is invalid on its face, it would be a useless expenditure of effort and money to submit it to the electorate before its validity had been determined"), *aff'd*, 381 A.2d 793 (N.J. 1978).

[9] Several states provide by statute for pre-election judicial review of initiative titles and petitions. *See, e.g.*, Okla. Stat. Ann. tit. 34, § 10 (West 1990); Colo. Rev. Stat. § 1-40-102(3) (Supp. 1992); Idaho Code § 34-1809 (Supp. 1992); Neb. Rev. Stat. §§ 32-706 and 32-707 (1991); Utah Code Ann. § 20-11-17 (1991); Wash. Rev. Code Ann. § 29.79.060 (West Supp. 1992); *see also Bradley v. Galloway*, 651 S.W.2d 445 (Ark. 1983) (Chancery Court has jurisdiction to review insufficient initiative petitions); *Power v. Robertson*, 93 So. 769 (Miss. 1922) (circuit court has jurisdiction to review sufficiency of initiative petitions); *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990) (directing the Title Setting Review Board to revise the title, ballot title and submission clause of an abortion initiative because they violated the Colorado Constitution).

II. INTERPRETING THE FIRST AMENDMENT TO REVOKE THE POWER OF STATE COURTS TO RULE ON THE CONSTITUTIONALITY OF INITIATIVE PETITIONS WOULD UNDERMINE PRINCIPLES OF JUDICIAL REVIEW.

Acceptance of petitioners' claim that the ruling below is a content- and viewpoint-based restriction on speech also flies in the face of fundamental principles of judicial review that have governed our nation since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

As Chief Justice Marshall asserted in *Marbury*: "It is emphatically the province and the duty of the judicial department to say what the law is." *Id.* at 177. The Chief Justice continued:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 178.

State courts have the same obligation to guard and enforce the Constitution. *Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("[u]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them"). Although Article III

of the United States Constitution usually prevents the federal courts from reviewing the constitutionality of *proposed* legislation,[10] no similar bar exists for state courts. *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952) (state courts not prohibited from ruling on federal constitutional issues in an advisory opinion); *see also Asarco, Inc. v. Kadish*, 490 U.S. 605, 620 (1989). In fact, as part of their duty to ensure that both the federal and state constitutions are not violated, many state courts, like the Oklahoma Supreme Court,[11] routinely review the constitutionality of initiative petitions before they are submitted to the general public for an election, *see supra* note 8, and several state constitutions specifically provide for pre-enactment judicial review of legislation or for the use of advisory opinions to obtain an early adjudication of constitutionality and avoid costly litigation on the enactment of laws that are clearly invalid.[12]

The Oklahoma Supreme Court clearly recognized its essential role as protector of the electoral process and the Constitution:

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[10] *But see Otey v. Common Council of City of Milwaukee*, 281 F. Supp. 264 (E.D. Wis. 1968).

[11] If reaching the constitutional issue may prevent a costly and unnecessary election, Oklahoma Courts routinely use pre-election judicial review. *See In re Initiative Petition No. 348*, 820 P.2d 772, 780 (Okla. 1991); *In re Initiative Petition No. 347*, 813 P.2d 1019, 1030 (Okla. 1991); *In re Initiative Petition No. 341*, 796 P.2d 267, 269 (Okla. 1990); *In re Initiative Petition No. 315*, 649 P.2d 545, 547-48 (Okla. 1982); and *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okla. 1975).

[12] *See, e.g.*, Colo. Const. art. VI, § 3; Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 3, art. II; N.H. Const. pt. 2, art. 74; R.I. Const. art. X, § 3; S.D. Const. art. V, § 5.

> This Court is the Protector of our Constitution. While the electorate has a constitutional right to amend the Oklahoma Constitution, it is this Court's responsibility to see that the petitions for change actually reflect the voters intent and comply with the requirements set out in both the Constitution and the statutes.

8a-9a (quoting *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990)). Adoption of petitioners' unsupported First Amendment theory would undermine state courts' time-honored role as the guardian and protector of constitutional principles and must therefore be rejected.

CONCLUSION

Because there is no First Amendment right to use the election process as a forum for political expression, and because acceptance by this Court of petitioners' novel and groundless claims would violate traditional principles of judicial review embraced by this Court for almost two hundred years, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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December 15, 1992

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

(7)

No. 92-784

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC. AND FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN AND KIM LITTLE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR RESPONDENTS FELDMAN AND LITTLE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to review the judgment of the Oklahoma Supreme Court invalidating the initiative petition because it was based on an adequate and independent state ground.

2. Whether the First Amendment requires Oklahoma to submit facially unconstitutional initiative petition proposals to a vote of the people.

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR RESPONDENTS FELDMAN AND LITTLE IN OPPOSITION

OPINION BELOW

The opinion of the Oklahoma Supreme Court (Pet. App. 1a – 52a) is not yet reported.

JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on August 4, 1992. The petition for writ of certiorari was filed on October 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. This case concerns an initiative petition to restrict abortion in Oklahoma circulated by petitioners. The Oklahoma statutes governing the initiative petition process provide that a proponent of an initiative first must file a copy of the proposed initiative petition with the Secretary of State and then has a ninety day period within which to circulate the petition for signature by registered voters. OKLA. STAT. tit. 34, § 8. The petition circulated must be accompanied by the complete initiative measure proposed and also must include "a simple statement of the gist of the proposition." OKLA. STAT. tit. 34, § 3. Upon completion of the circulation period, the proponent must file the signed copies of the petition with the Secretary of State. OKLA. STAT. tit. 34 § 8. If the initiative has the required number of presumptively valid signatures,[1] notice is published and any citizen may file a protest within ten days. *Id.* A protest may be filed to the signature count or to the sufficiency of the petition. *Id.* The Oklahoma Supreme Court hears the protests and then "shall decide whether such petition be in form as required by the statutes." *Id.*

2. On June 29, 1990, petitioners filed their proposed Initiative Petition No. 349 with the Secretary of State (Pet. App. 109a – 120a). On December 17, 1990, the Oklahoma Supreme Court issued an order for notice to be published to begin the ten day period for filing protests to Initiative

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[1] The Oklahoma Constitution, art. 5 § 2, provides that the initiative requires the signatures of eight (8) percent of the total number of votes cast at the last general election for the State office receiving the highest number of votes at such an election.

Petition No. 349 (Pet. App. 106a – 108a). Respondents, Nancy Feldman and Kim Little, two citizens of the State of Oklahoma, filed a protest to the legal sufficiency of the initiative petition on December 31, 1990 (Pet. App. 95a – 105a).

3. On July 14, 1992, the Oklahoma Supreme Court issued an order to all parties to the protest of Initiative Petition No. 349 for briefing on the constitutionality of the initiative in light of this Court's decision in *Planned Parenthood v. Casey*, Nos. 91-744, 91-902 (June 29, 1992). (Pet. App. 88a – 89a). On August 4, 1992, the Oklahoma Supreme Court entered judgment that Initiative Petition No. 349 proposed restrictions on abortion in violation of the United States Constitution and ordered the initiative stricken from the ballot (Pet. App. 1a – 52a).

The Oklahoma Supreme Court held that review of the constitutionality of the initiative petition before it was submitted to the voters was required by article 2, section 1 of the Oklahoma Constitution, which limits the right of the initiative to propositions that are "not repugnant to the Constitution of the United States." (Pet. App. 11a). The supreme court also held that review was required to determine if the signers of the initiative had been misled as to the legal effects of the initiative if it were adopted (Pet. App. 11a – 12a).

The Oklahoma Supreme Court interpreted this Court's decision in *Planned Parenthood v. Casey* as reaffirming that the State may not deprive a woman of the right to terminate her pregnancy before viability (Pet.

App. 6a – 7a). The supreme court determined that Initiative Petition No. 349 criminalized and prohibited abortions before viability except in four narrow circumstances. The supreme court held that the provisions of Initiative Petition No. 349 violated a woman's liberty interest as defined in *Casey* and thus was unconstitutional (Pet. App. 7a – 9a).

The supreme court determined that the proponents of Initiative Petition No. 349 had conceded that the initiative was unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), when the initiative was drafted and circulated, and that if the initiative were adopted by the voters it would be unconstitutional under *Roe* and *Casey* (Pet. App. 9a). The petitioners had conceded that their purpose in circulating the initiative petition was not to amend Oklahoma law but to create a "test case" to attempt to change federal constitutional law (Pet. App. 11a, 14a). The supreme court found that the initiative petition as circulated did not inform prospective signers, whether in the initiative itself or in the ballot title, or gist, that the proposition would be unconstitutional if adopted by the voters (Pet. App. 11a).

The supreme court rejected petitioners' claimed First Amendment right to have an unconstitutional initiative placed on the ballot for the purpose of creating a "test case." (Pet. App. 12a – 13a). The supreme court reaffirmed its obligation to enforce the Oklahoma Constitutional provision limiting the right of the initiative to proposed changes in Oklahoma constitutional or statutory law (Id.). The supreme court held that pre-submission review of proposed initiatives for constitutionality served the important state interest in preserving the

integrity of the initiative process. Submitting to the voters an initiative that would be unconstitutional if adopted would delude the voters into believing that "their votes on matters of public concern count" when in fact their votes would be "ultimately meaningless acts in an elaborate charade." (Pet. App. 15a). Moreover, the failure of Initiative Petition No. 349 to inform voters that it proposed unconstitutional restrictions on abortion could have misled those who "may support state-imposed limitations on abortions, but who are not inclined to vote for an unconstitutional measure." (Pet. App. 11a). Because voters might be especially reluctant to support an unconstitutional measure, the vote on such an initiative cannot be considered a "meaningful vote" on the proposed measure (Pet. App. 15a). The supreme court concluded that the integrity of the initiative process would be threatened by submission of the unconstitutional initiative petition to a vote. Rather than voting on an initiative measure that could become law, the voters would be engaged in "an expensive, non-binding public opinion poll." (Pet. App. 16a).

ARGUMENT

This Court lacks jurisdiction to hear this case because the Oklahoma Supreme Court justified its refusal to submit Initiative Petition No. 349 to a vote on an adequate and independent state ground. Moreover, the Oklahoma Supreme Court correctly held that its pre-submission constitutionality review of initiative proposals and its refusal to submit unconstitutional initiative proposals to a vote of the people constitute reasonable, non-discriminatory

restrictions upon the First and Fourteenth Amendment Rights of voters that are justified by the State's important regulatory interests. *See Burdick v. Takushi*, No. 91-535 (June 8, 1992), slip op. 5. Oklahoma conducts its pre-submission constitutionality review by analyzing the legal effects, not the subject matter, message or ideas, of the initiative proposals. The interests Oklahoma protects by its pre-submission constitutionality review are compelling, while the burdens the review imposes on the First and Fourteenth Amendment rights of voters and sponsors of initiative petitions, if any, are modest. Applying this Court's standard adopted in *Burdick v. Takushi*, slip op. 4-6, Oklahoma's pre-submission constitutional review does not impose an unconstitutional burden on Oklahoma voters' First and Fourteenth Amendment rights. The Oklahoma Supreme Court's decision below was correct and not in conflict with any decision of this Court. Review by this Court is unwarranted.

1. This Court lacks jurisdiction to hear this case because the Oklahoma Supreme Court justified its refusal to submit Initiative Petition No. 349 to a vote of the people on an adequate and independent state ground. The Oklahoma Supreme Court held that Initiative Petition No. 349 failed completely to inform prospective signers that its proposals to criminalize most abortions in Oklahoma were unconstitutional and that its sole legal effect would be to create a test case challenging the vitality of *Roe v. Wade*. Thus, even if this Court were to find that it is impermissible under the First Amendment to deny voters the opportunity to vote on facially unconstitutional initiative petititon proposals, petitioners here would not be entitled to a vote because they failed to

inform prospective signers of the true legal effect of Initiative Petition No. 349. Under these circumstances, this Court lacks jurisdiction because its constitutional holding cannot affect the ultimate outcome of the case below. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Oklahoma has constitutionally and legislatively imposed on the Oklahoma Supreme Court the duty to review the initiative to see that the petition as circulated actually reflected the signers' intent. The Constitution commands that "Laws shall be provided to prevent corruption in making, procuring, and submitting initiative and referendum petitions." OKLA. CONST., art. 5, § 8. One such statutory safeguard requires initiative petitions to contain a "simple statement of the gist of the proposition." Okla. Stat., tit. 34, § 3.[2] This statement "must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition." *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990).

In this case, petitioners admitted in their July 24, 1992, brief to the Oklahoma Supreme Court that "State Question 642 was intended to be, remains now, and shall be, if passed, a test case." (Pet. App. 58a). As drafted and circulated, Initiative Petition No. 349 did not contain a single sentence informing potential signers that its design, purpose and intended effect was to create a test

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[2] This provision has been deemed "essential to guard against fraud, corruption or deception in the initiative and referendum process. . . . " *In re Initiative No. 344*, 797 P.2d at 330 (Okla. 1990); *Community Gas and Service Co. v. Walbaum*, 404 P.2d 1014, 1016 (Okla. 1965).

case of the continuing viability of *Roe v. Wade* (Pet. App. 109a – 120a). The Oklahoma Supreme Court determined that neither the initiative petition itself nor the ballot title accompanying it informed prospective signers that the proposal was unconstitutional (Pet. App. 11a). Thus, the Oklahoma Supreme Court concluded that this failure to inform signers of the fact that the proposed initiative would be unconstitutional was deceptive (Pet. App. 11a). The supreme court was especially concerned that signers of the petition who supported restrictions on abortion but would not support unconstitutional restrictions could have been deceived (*id.*). The Oklahoma Supreme Court's ruling on this matter is consistent with the court's past practices concerning deceptively worded initiative petitions.[3]

2. The Oklahoma Supreme Court has since 1975 examined initiative and referendum proposals to determine if they meet the substantive requirements of Oklahoma's Constitution and the Constitution of the United

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[3] The Oklahoma Supreme Court has invalidated initiatives when the "gist" failed to mention important provisions of the petition such as that the initiative would abrogate the fellow-servant doctrine, that foreign corporations would no longer be prohibited from exercising the power of eminent domain, and that the prohibition against corporations influencing elections by making contributions would be removed. *In re Initiative Petition No. 342*, 797 P.2d 331, 333-334 (Okla. 1990). The Oklahoma Supreme Court invalidated an initiative when the gist informed the signers of only eight of the twenty-five changes the initiative would make in the Oklahoma Constitution that would increase the power of the Governor. *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990).

States. *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma,* 534 P.2d 3 (Okla. 1975). Petitioners contend that by denying voters the right to vote on facially unconstitutional initiative petition proposals, Oklahoma discriminates among initiative petitions on the basis of content, ideas or messages.

It is certainly true that the Oklahoma Supreme Court denies ballot access to initiative proposals that would, if approved by the voters, violate the constitutional rights of its citizens. But, the basis of this denial is the legal effects the initiative proposals would produce and the impacts these legal effects would have on the lives of Oklahoma citizens and on the integrity of Oklahoma elections and law. In the instant case, the Oklahoma Supreme Court did not in any way concern itself with either the subject matter of the initiative petition or the ideas and messages it reflected (Pet. App. 13a – 14a). Proposals that will not violate the constitutional rights of Oklahoma citizens or impair the integrity of Oklahoma elections and law will be submitted to a vote of the people no matter how controversial are their subject matters or the nature of their ideas and messages. It therefore cannot be said that Oklahoma's pre-submission constitutionality reviews produce impacts on speech or expression as a result of the content-based regulation condemned by the First Amendment. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968).

3. Oklahoma's pre-submission constitutionality review of initiative proposals is a reasonable regulatory tool that serves important and compelling state interests. First, pre-submission review insures that the initiative process cannot be used to infringe the rights of Oklahoma

citizens to be free from state government action and state laws that are inconsistent with the guarantees of the Constitution of the United States.[4] Certainly, this interest cannot be protected unless the Oklahoma State Supreme Court conducts pre-submission constitutionality review of initiative proposals, for without the review, unconstitutional proposals might be approved by a vote of the people, thereby jeopardizing the federal constitutional rights of many Oklahoma citizens. These unfortunate citizens would not be able to vindicate their rights without enduring burdensome, even ruinous legal proceedings that often arise from the state's futile efforts to enforce unconstitutional laws.[5] As the Oklahoma Supreme Court

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[4] This interest was so important to the Framers of Oklahoma's Constitution that they proposed and gained ratification for a constitutional provision requiring that initiative proposals conform to constitutional commands of the nation. It provides:

> All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it; *Provided, such change be not repugnant to the Constitution of the United States.* (Emphasis added).

OKLA. CONST., art. 2, § 1.

[5] It is important to note here that this Court has recognized the right of the states to allow their citizens to bring in state courts federal constitutional challenges to the validity of laws and governmental action under circumstances where such challenges could not be maintained in federal courts because of Article III justiciability requirements. See, *Asarco v. Kadish*, 490 U.S. 605, 617 (1988). Should this Court invalidate Oklahoma's pre-submission constitutionality reviews of initiative petition proposals, it would in effect deny states their rights to deter-

observed, petitioners' First Amendment challenge to pre-submission constitutionality reviews "is, in effect, an argument that their 'free speech' rights to advocate an unconstitutional law outweigh constitutional rights of all other Oklahomans that the Oklahoma Constitution should not be repugnant to the Constitution which we all share as Americans." (Pet. App. 12a – 13a).

It is self-evident that no one is entitled to have unconstitutional laws enacted and preserved. Oklahoma's pre-submission constitutionality review merely hastens the time when its citizens receive their constitutional rights to be protected from unconstitutional laws. If this Court disturbs the method by which Oklahoma has chosen to protect its citizens from unconstitutional enactments, it will be "impos[ing] federal standing requirements on [Oklahoma's Supreme Court] whenever [it] adjudicate[s] issues of federal [constitutional] law, if those judgments are to be conclusive on the parties." *Asarco v. Kadish*, 490 U.S. at 620. "That result . . . would be contrary to established traditions and to our prior decisions recognizing that the state courts are not bound by Article III and yet have it within both their power and their proper role to render binding judgments on issues of federal law, subject only to review by this Court." *Id.*

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mine for themselves when matters are justiciable in state courts simply because the initiative process is involved. Such a ruling would amount to a requirement that states stand idly by as a misguided electorate chooses to violate the constitutional rights of their fellow citizens in a manner that allocates risks of constitutional harm more to the victims than to the perpetrators.

4. Oklahoma's pre-submission constitutionality review is a politically neutral procedure that protects the integrity of its initiative process by preserving the meaningfulness of elections. Just as states can legitimately regulate the number of candidates on the ballot to avoid voter confusion and "frustration of the democratic election process at the general election", *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), Oklahoma can legitimately regulate the initiative process by limiting its use to measures that could become law if approved by the voters. The Oklahoma Supreme Court has determined that deferring a ruling on "transparently unconstitutional [initiative] proposals" until after they are approved by the voters is detrimental to the initiative process in that "citizens may be led to believe that their votes on matters of intense public concern count, when this Court is already fully aware that the proposed measure is subject to being struck down within months should the voters approve it." (Pet. App. 15a). Thus, the initiative process will be "subject to the perception by the citizens . . . that their votes . . . are ultimately meaningless acts in an elaborate charade." (*id.*).

A second aspect of the integrity of the initiative process addressed by the Oklahoma Supreme Court concerns the right of prospective signers of initiative petitions to be given information sufficient to inform them accurately of the effects of the measure. This Court has "repeatedly upheld reasonable politically neutral regulations that have the effect of channeling expressive activity at the polls." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). States must have the power to substantially regulate elections "if they are to be fair and honest

and of some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

As discussed above, the Oklahoma Supreme Court determined that neither the initiative petition itself nor the ballot title accompanying it informed prospective signers that the proposal was unconstitutional (Pet. App. 11a). Thus, the Oklahoma Supreme Court concluded that this failure to inform signers of the fact that the proposed initiative would be unconstitutional was deceptive (Pet. App. 11a). The supreme court was especially concerned that signers of the petition who supported restrictions on abortion but would not support unconstitutional restrictions could have been deceived (*id.*).

A third aspect of the integrity of the initiative process addressed by the Oklahoma Supreme Court concerns the rights of voters who may support the overall intent and direction of specific initiative proposals but are not willing to accomplish their goals by unconstitutional means. Such voters face a dilemma: No matter how they vote, they will be forced to send a message contrary to their true beliefs. Either they vote yes, signalling incorrectly that they support unconstitutional action, or they vote no, signalling incorrectly that they do not support the general aims and direction implicit in the initiative proposals. In the end, as the Oklahoma Supreme Court noted, "the vote on an indisputably unconstitutional measure will almost certainly be distorted by widespread citizen awareness of the invalidity of the measure . . . [so that] a truly meaningful vote on the initiative becomes impossible." (Pet. App. 15a). Moreover, these citizens' rights would be further imperilled by initiative elections on unconstitutional

measures because Oklahoma significantly increases the number of signatures sponsors of an initiative must secure if it is being circulated within three years after a substantially identical measure has been defeated in an inititative election.[6] This increased burden may be insurmountable even though the measure defeated becomes constitutional thereafter by virtue of a change in case law or a constitutional amendment.

5. This Court has consistently held that the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. *Burdick v. Takushi*, slip op. 4; *Munro v. Socialist Workers Party*, 479 U.S. at 193. The burdens Oklahoma's pre-submission constitutionality review of initiative petitions impose on initiative sponsors' and voters' First and Fourteenth Amendment rights, if any, are modest. Oklahoma's pre-submission review does not involve discrimination against intiative proposals on the basis of its subject matter, messages, and ideas, but is a reasonable regulatory tool for insuring the integrity of Oklahoma's initiative process.

a. Petitioners allege that Oklahoma's pre-submission constitutionality review of initiative petitions

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[6] OKLA. CONST., art. 5, § 6 provides: "Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters." This significantly increases the burden of initiative supporters, because otherwise they would only have to get valid signatures of eight per centum of the legal voters for legislative measures and fifteen per centum of legal voters for proposals to amend the state's constitution. OKLA. CONST., art. 5, § 2.

deprive initiative sponsors and voters of their ability to launch test cases challenging the continuing vitality of this Court's current constitutional precedents. Oklahoma's pre-submission constitutionality review of initiative petitions not only does not impede anyone's ability to raise test cases through the initiative process, but in fact insures that a test case can reach this Court whenever it results in the measure being denied a vote of the people.

In the first place, Oklahoma's pre-submission review of intiative petitions does not deny anyone access to the initiative process as a means of expressing his or her political ideas. The Oklahoma Supreme Court made clear that "[n]othing in this opinion should be read to limit the content of any petition circulated." (Pet. App. 13a). Anyone may circulate indisputably unconstitutional initiative petitions and circulators are free to use the signature gathering process as a forum for political speech. As a consequence, neither the facts nor the holding of *Meyer v. Grant*, 486 U.S. 414 (1988), relied on by petitioners, are applicable to this case.

Secondly, whenever the Oklahoma Supreme Court finds that an initiative petition contains proposals that violate the Constitution of the United States, and therefore refuses to submit it to a vote of the people, it has taken action that guarantees the petition's sponsors an opportunity to bring a test case to this Court. Under Oklahoma law, sponsors of initiative petitions are entitled to have them submitted to a vote of the people if they meet all legal requirements, including surviving challenges based on federal constitutional grounds. The excluded petition's sponsors will have suffered a direct,

specific, and concrete injury (denial of a vote) as a result of the Oklahoma Supreme Court's incorrect interpretation of federal constitutional law. Moreover, a ruling by this Court correcting the errors of the Oklahoma Supreme Court would redress the sponsors' injuries. *Asarco v. Kadish*, 490 U.S. at 617-624.

Finally, there would be in existence a case or controversy. The petition's sponsors will be seeking to vindicate their right to a vote on valid initiative. Those permitted by Oklahoma to challenge the legal sufficiency of initiative petitions will be seeking to preserve their right under Oklahoma law not to be subjected to an election involving transparently unconstitutional initiative proposals. Under such circumstances, "the proceedings [would be] judicial in nature, and result[ ] in a final judgment altering tangible legal rights." *Asarco*, 490 U.S. at 619.

b. Petitioners also assert that pre-submission review impedes their ability to express their opposition to this Court's current constitutional precedents by campaigning and voting in an initiative election. However, the First Amendment does not require Oklahoma to provide a state-wide vote on petitioners' unconstitutional initiative, even though petitioners may consider such a vote the preferred method of disseminating their statement of protest against this Court's interpretation of the United States Constitution.

In *Burdick v. Takushi* this Court upheld Hawaii's prohibition of write-in votes as a legitimate regulation of the election process even though it prevented the petitioner from expressing his message of political protest at the voting booth. This Court held that to require states to

permit their election system to be used for a "more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Burdick*, slip op. 9-10 (citing *Storer v. Brown*, 415 U.S. at 730). As the Oklahoma Supreme Court correctly held, Oklahoma is not constitutionally required to conduct "an expensive, non-binding public opinion poll." (Pet. App. 16a).

In *Burdick*, this Court also focused on alternative means for expressing the "message" that might be lost by a denial of ballot access to show that the ultimate impact on the petitioner of Hawaii's ballot access regulations were minimal and outweighed by Hawaii's legitimate interests served by the ballot access regulation in question. *Id.*, at 6-10. Sponsors of unconstitutional initiative proposals have a myriad of options for getting out their message of protest to the constitutional status quo. These include:

- Circulating unconstitutional initiative petitions so that their message of protest can be disseminated through the signature challenge process and so that a test case can be launched;

- Circulating constitutional initiative petitions that concern the subject matter of the offending constitutional principle and contain provisions that could reduce the scope of the offending constitutional principle so that an initiative election can be held that will supply the sponsors with a broader forum for their message of protest;

- Participating in the lobbying efforts required to convince Congress and state legislatures to

propose, consider and ratify constitutional amendments;

- Participating in Presidential and Congressional elections in a manner that makes the willingness of candidates to support constitutional amendments or the appointment of Supreme Court justices willing to overturn offending case precedent a visible campaign issue.

It is important to note that two of these options involve access to the ballot as a means of getting out the message of protest that otherwise will not be delivered if unconstitutional initiative proposals are denied a vote of the people. This is consistent with the identification in *Burdick* of ballot access options for the petitioners' message of generalized protest. *Burdick*, slip op. 6-10.

If Oklahoma is forced to abandon its pre-submission constitutionality review of initiative petitions, several compelling state interests that can be protected adequately only by such review will be jeopardized. Moreover, forcing the Oklahoma Supreme Court to delay the timing of deliberations designed to protect the constitutional rights of Oklahoma citizens will destroy its right under our federalist system to be free from federal justiciability standards as it exercises its concurrent jurisdiction over federal constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 1992

Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

No. 92-784

In the Supreme Court of the United States

OCTOBER TERM 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
OKLAHOMA SUPREME COURT

REPLY TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS

1. Is the expression attendant to the initiative petition process, from certification through voting, core political speech?

2. Does Oklahoma law, as construed and applied, violate the First and Fourteenth Amendments as a prior restraint on core political speech when the Oklahoma Supreme Court strikes from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision?

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OPINION BELOW

The Oklahoma Supreme Court's opinion (App. 1a-52a) has been published at 838 P.2d 1 (Okla. 1992).

ARGUMENT

INTRODUCTION

Three briefs were filed in opposition to the petition for certiorari in this case. The Respondents and the Oklahoma Attorney General variously represented to this Court, inter alia:

- that the Oklahoma Supreme Court did not concern itself with State Question 642's subject, ideas, and messages (even though that court struck the measure from the ballot because its content may be presently unconstitutional);
- that there is no pressing need for this Court's decision on Petitioners' questions (even though two other jurisdictions have struck down initiatives based on their content since State Question 642 was stricken);
- that the First Amendment issue was not raised below (even though the first proposition of the Petitioners' July 24, 1992, brief to the Oklahoma Supreme Court was devoted to core political speech);
- that the striking of State Question 642 from the ballot did not infringe on the free expression of ideas in Oklahoma (even though, today, the billboards have been taken down and the bumper stickers gather dust in storage);
- that politicians conduct a "more cautious and deliberative legislative process" than a direct vote of the people (even though a law enacted through an initiative of the people is the product of pure democracy, unsullied by the political gamesmanship of legislators).

The foregoing examples, along with the balance of the opposition briefs, fail to answer the fundamental question: whether the Oklahoma Supreme Court may strike from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision, thereby excluding the Petitioners' viewpoints and ideas from a First Amendment forum. In this reply, Petitioners will address but a few of the arguments presented by Respondents and the Oklahoma Attorney General.

JURISDICTION

Feldman and Little contend at page 15 of their brief that Petitioners could have appealed part I of the Oklahoma Supreme Court's August 4, 1992, opinion. Part I is nothing

more than an advisory opinion on the constitutionality of State Question 642. Petitioners could not appeal to this Court part I of the Oklahoma Supreme Court's judgment. Neither Supreme Court Rule 10 nor 28 U.S.C. § 1257(a) provides for an appeal to this Court concerning the constitutionality of a proposed statute. This Court does not review the constitutionality of proposed statutes.

This Court is not being asked to review the Oklahoma Supreme Court's advisory interpretation of federal constitutional law. Instead, the Petitioners seek reversal of part II of the August 4, 1992, decision, which violated the First Amendment. This Court has jurisdiction to determine if core political speech was denied. If this Court determines that the expression attendant to the initiative petition process from certification through voting is core political speech, then the judgment of the Oklahoma Supreme Court should be reversed and remanded for completion of the initiative petition process.

SINGLE DISPOSITIVE ISSUE

Beginning at page 6 of their brief, Respondents Feldman and Little argue that State Question 642 has been disposed of on state grounds. Feldman and Little initially raised below a number of legal issues. But, the Oklahoma Supreme Court opined that the single dispositive issue was the constitutionality of State Question 642. The Oklahoma court reached the constitutionality of State Question 642 by construing and applying Oklahoma law in a way that restrained core political speech in violation of the First and Fourteenth Amendments. It was the Oklahoma Supreme Court's construction and application of state law that framed the Petitioners' First Amendment case.

THE ARGUMENT BELOW

The Oklahoma Attorney General contends that Petitioners did not preserve the core political speech argument below. The first proposition of Petitioners' July 24, 1992, brief in the Oklahoma Supreme Court (App. 59a) addressed the issue of core political speech. Petitioners specifically argued that the

Oklahoma Supreme Court's review of the constitutionality of State Question 642 was itself unconstitutional under the First and Fourteenth Amendments.

The Oklahoma Attorney General also contends that the issue was raised, if at all, at the "eleventh hour" in a final brief and that the Attorney General had no opportunity to respond. However, the Oklahoma Supreme Court's July 14, 1992, briefing order required the filing of simultaneous briefs, thus affording no one an opportunity to respond. There was no reason to raise the First Amendment argument until the Oklahoma Supreme Court sua sponte decided to review the content of State Question 642. The core political speech issue was timely raised.

VIEWPONT CONTROL

Feldman and Little argue at page 9 of their brief that the Oklahoma Supreme Court "did not in any way concern itself with either the subject matter of the initiative petition or the ideas and messages it reflected." By "ideas and messages" the Respondents apparently refer to viewpoint. While the Respondents suggest the Oklahoma Supreme Court was blind to the viewpoint of State Question 642, the court's decision to strike the measure from the ballot was based on nothing other than State Question 642's content. When the Oklahoma Supreme Court picks and chooses among initiative petitions to appear on the ballot, it focuses directly on the content of each state question and makes its decision based upon that content.

Feldman and Little contend at page 6 of their brief, that the burden upon the First and Fourteenth Amendment rights of voters by the Oklahoma Supreme Court's construction and application of Oklahoma law is "modest." Content control of core political speech, no matter how "modest," will not withstand the exacting scrutiny test of *Meyer v. Grant*, 486 U.S. 414 (1988).

CONFLICT AMONG THE STATES

Contrary to the statements made by the Oklahoma Attor-

ney General and the "numerical sufficiency" Respondents,[1] the petition for certiorari discussed the conflict among the states concerning the issue of presubmission content review. This conflict demonstrates an immediate need for this Court to resolve the issue.

One month after the Oklahoma Supreme Court struck State Question 642 from the ballot because of its content, the Nevada Supreme Court struck an initiative petition from the ballot also because of its content.[2] Then, in October, a District of Columbia court held that it too could perform presubmission content review.[3] There is immediate need for this Court to review the recurring usurpation of the people's First Amendment rights in initiative petition jurisdictions throughout the nation.

BALLOT ACCESS

Respondents cite *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), for the proposition that there is no First Amendment right to use the election process. *Burdick*, however, is a ballot access case. Ballot access cases concern political association or the election of candidates. *Clements v. Fashing*, 457 U.S. 957, 964 (1982). Respondents are trying to transform this core political speech case into a ballot access case. The issue is not whether Oklahoma law as construed and applied is politically neutral, but whether it is content neutral under the First Amendment. The advocacy attendant to the passage

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[1] On December 16, 1992, the numerical sufficiency protestants below, Taliaferro, Fleischaker, and Tevington, filed a brief in opposition to the October 29, 1992, petition for a writ of certiorari. These "numerical sufficiency" Respondents do not address anywhere within their brief in opposition their standing to challenge the petition for certiorari. These "numerical sufficiency" Respondents did not raise any legal or constitutional issues below and strictly confined their independent proceeding to the number of signatures presented in support of State Question 642. Taliaferro, Fleischaker, and Tevington lack standing in the legal sufficiency proceeding filed by Feldman and Little.

[2] *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992).

[3] *Hessey v. Burden*, 615 A.2d 562 (D.C. 1992).

or defeat of initiative petition legislation is core political speech. *Meyer*, 486 U.S. at 428.

UNCONSTITUTIONAL LEGAL REQUIREMENTS

The "numerical sufficiency" Respondents state at page 5 of their brief in opposition:

> Nothing in *Meyer* supports the view that there is a First Amendment right to cast a ballot on an initiative that fails to meet a state's legal requirements for placement on the ballot.

Feldman and Little made a similar argument. If the state's requirements for placement on the ballot involve the construction and application of state law so that initiative petition proponents may have initiatives on some subjects or viewpoints but not other subjects or viewpoints, then those requirements are unconstitutional under the First Amendment.

PRESUBMISSION REVIEW VERSUS POSTENACTMENT REVIEW

Respondents argue that Petitioners' position would undermine the role of the judiciary as the ultimate arbiter of the constitutionality of legislation. Certainly, this Court is the ultimate judge of the constitutionality of enacted law. The question is whether the highest court of a state can perform presubmission content review to restrict the people's debate of and vote upon citizen-initiated legislation that has not yet become law. If the people enact the proposed legislation, then, of course, the judicial branch of government may review its constitutionality. But the judicial branch of state government should not sua sponte inject itself into the initiative petition process to censor a viewpoint from the people's debate and vote.

VOTER "PROTECTION"

The "numerical sufficiency" Respondents argue at page 9 of their brief that presubmission constitutional review is "an effective method of voter protection." State government should not be allowed to tell the people what they may

express through the initiative petition process simply because a branch of state government (e.g., the judicial branch of Oklahoma) does not like what the people are saying. The people do not need to be protected from themselves by a paternalistic state judiciary.

STATE'S RIGHTS

The First Amendment protects free speech from interference by the government, either by the judicial branch or the executive branch. The Oklahoma Supreme Court now controls the content of initiative petitions. If the content is not "proper" according to the Oklahoma Supreme Court, then the measure will not be certified and the expression attendant to the initiative petition process from certification through voting will never occur. Similarly, the Attorney General relies on the argument that Colorado unsuccessfully used in *Meyer*, i.e., that since the initiative is a creation of the state, the state may fetter the initiative petition process. Although a state is not obligated to create a forum for core political speech, once it does so, it may not control the content or viewpoint of the speech occurring therein. *Meyer*, 486 U.S. at 420.

QUANTUM

The "numerical sufficiency" Respondents and the Oklahoma Attorney General suggest that Oklahoma law as construed and applied does not limit speech and that Petitioners are free to discuss the subject of State Question 642 by any means they desire. The Petitioners desire to utilize the initiative petition forum in its entirety. Under *Meyer*, Petitioners are allowed to select the forum for their speech. The initiative petition forum, from circulation through voting, affords an extensive quantum of speech. This Court held in *Meyer* that, when the quantum of the debate is reduced, an impermissible restriction on First Amendment speech occurs. 486 U.S. at 423.

CIRCULATION THROUGH VOTING

Feldman and Little admit at page 15 of their brief that the

content of initiative petitions cannot be controlled during the circulation phase but argue that, as one approaches the election and the core of the electoral process, the state may regulate the content of initiative petitions and eliminate some initiatives based on content alone. Respondents apparently believe that more First Amendment protection should be afforded core political speech occurring at the periphery of the initiative petition process than during the campaign or the vote upon the initiative petition in question. There is, however, no First Amendment difference between core political speech occurring during the circulation period versus the campaign period.

THE THOUGHTFUL PART OF THE NATION

Feldman and Little complain at page 4 of their brief that State Question 642 was intended as a test case. If State Question 642 is approved by the voters, however, it will be Oklahoma law. This was the Petitioners' short term goal. Their long term goal was to have the statute upheld by this Court through a change in constitutional law, because no one except this Court can conclusively say what is or is not constitutional.

Constitutional law can change. If this were not true, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), would not have been partially overruled in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Feldman and Little argue at page 11 of their brief, "It is self-evident that no one is entitled to have unconstitutional laws enacted and preserved." According to that theory, the Pennsylvania legislature could never have enacted the statute addressed in *Casey*.

In *Casey*, this Court discussed the holdings in *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). This Court explained that these decisions were ultimately overruled in spite of stare decisis because there came a point in time when "the thoughtful part of the

Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Casey*, 112 S. Ct. at 2813. Petitioners submit that initiative petition signers, debaters, and voters are included within the "thoughtful part of the Nation." The people cannot make known to this Court the fact that they can accept a decision to overrule a prior case if the forum for making that communication is closed by the highest court of a state.

CONCLUSION

Petitioners request that their petition be granted, that the judgment of the Oklahoma Supreme Court be vacated, and that this Court remand the case to the Oklahoma Supreme Court for completion of the initiative petition process.

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